REPORT

ON

EXEMPLARY DAMAGES

ONTARIO LAW REFORM COMMISSION

EXECUTIVE SUMMARY

Ontario

1991

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The Ontario Law Reform Commission was established by the *Ontario Law Reform Commission Act* for the purpose of reforming the law, legal procedures, and legal institutions.

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EXECUTIVE SUMMARY

In its *Report on Exemplary Damages*, the Ontario Law Reform Commission seeks to accomplish two main objectives. First, it seeks to respond to the arguments made in recent years suggesting that exemplary or punitive damages have contributed to a crisis in the operation of the tort law system, and to the so-called "insurance crisis". Second, it seeks to rationalize the theoretical basis of exemplary damages, to assist in ensuring that they are awarded in accordance with clearly articulated principles.

Exemplary damages are awarded primarily to deter and punish the defendant for reprehensible conduct. Over the past several years, a great deal of concern has been expressed that exemplary damages have contributed to a perceived crisis in the operation of both the tort system, and the insurance industry. The specific concerns expressed include the following: (1) that exemplary damages are being claimed, and awarded, much more frequently than they were in the past; (2) that they are being claimed, and awarded, in cases involving increasingly diverse causes of action; (3) that they are being awarded in larger amounts than they once were; (4) that they are being awarded in cases in which they are not justified, or in excessive amounts; and (5) that spurious claims for exemplary damages may have an undesirable effect on the settlement process, by coercing defendants to settle claims, or settle claims for higher amounts, than they would otherwise.

In order to investigate these concerns, and to develop a statistical foundation for this report, an empirical study was undertaken on behalf of the Commission. On the basis of this and other research conducted in connection with the report, the Commission concludes that there is no evidence of a "crisis" caused by the existing law of exemplary damages. The Commission also concludes that, given the existing legal principles in Ontario, it is unlikely that such a crisis would occur here.

The Commission does, however, make a number of recommendations for reform of the law of exemplary damages, designed to provide a clear, consistent and rational basis for such damages. In order to accomplish this objective, the Commission adopts a functional approach, isolating the three functions, or rationales, typically advanced to justify the award of exemplary damages: (1) compensation; (2) punishment; and (3) deterrence.

The Commission attempts to clarify the present law by making the goals sought to be achieved by an award of exemplary damages more explicit, and by identifying specifically the policy goals to which exemplary damages ought to be required to respond.

Chapter 2 summarizes the present law of exemplary damages in Canada, England, and the United States. It also contains a discussion of some of the significant differences between the law in Canada and the United States. Chapter 3 provides an outline of the arguments ordinarily advanced for and against the award of exemplary damages. The empirical information available about exemplary damages in Ontario and the United States is summarized in chapter 4.

One obvious approach suggested by the functional analysis adopted by the Commission is to exclude entirely the compensatory function from exemplary damages. The courts have already attempted to isolate the compensatory function by distinguishing aggravated damages from exemplary damages. Traditionally, aggravated damages compensate the plaintiff for injuries to pride and dignity resulting from the defendant's exceptional conduct, while exemplary or punitive damages are intended to punish and deter the defendant. Therefore, the analysis in chapter 5 begins not with exemplary damages, but with aggravated damages. The Commission recommends that injuries to pride and dignity should be compensated according to ordinary compensatory principles. Specifically, the Commission recommends that the court should be empowered to award compensatory damages for injuries to pride and dignity as part of the ordinary global award of damages for non-pecuniary loss, and that such damages should be available without proof of exceptional conduct. Our recommendations are designed to distinguish more sharply the compensatory function from deterrence and punishment, and so to clarify the subsequent analysis of exemplary damages.

Chapter 6 deals with the general case for exemplary damages as a supplement to the criminal law. Historically, the primary function of exemplary damages has been punishment, and the Commission recommends that it remain so. The Commission endorses the concept of civil punishment in exceptional cases as a supplement to the criminal law, and supports the symbolic function of punitive damages. It recommends that exemplary damages for the purpose of punishment should continue to be available in Ontario, and should be referred to as "punitive damages", a term deliberately adopted to convey more accurately the purpose of the award.

The Commission further recommends that punitive damages should be awarded only where the defendant has advertently committed a wrongful act deserving of punishment, and where the defendant's conduct was exceptional. It also recommends that the size of an award of punitive damages should be proportionate to the gravity of the act deserving of punishment. Finally, the Commission makes proposals respecting a variety of issues, including the quantification of punitive damages, the burden of proof, vicarious liability, concurrent wrongdoers, and the survival of claims.

In chapter 7 the Commission deals with an aspect of "tort for profit", and recommends that where a plaintiff chooses the remedy of restitution, rather than suing in tort, he or she should also be entitled to claim punitive damages.

In chapter 8, special issues that pertain to negligence, nuisance, and equitable wrongs are discussed. The Commission recommends that punitive damages should be available, in accordance with the earlier proposals, in these cases. In chapter 9 the Commission considers the unique case for imposing punitive damages on statutory public authorities, and recommends that public authorities should remain independently liable for punitive damages where they knowingly exceed their legal authority and injure another tortiously. Finally, in chapter 10, the Commission discusses extra damages in contract, and concludes that it would be premature to make recommendations for reform in this context.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

CHAPTER 5 COMPENSATION FOR INJURY TO PRIDE AND DIGNITY: BEYOND AGGRAVATED DAMAGES

1. (1) The court should be empowered to award compensatory damages for injuries to pride and dignity as part of the ordinary global award of damages for nonpecuniary loss.

   (2) Such an award should be available for ordinary tortious conduct, that is, without proof of exceptional conduct.

2. Aggravated damages, as they are currently understood, should be abolished.

CHAPTER 6 THE GENERAL CASE FOR PUNITIVE DAMAGES: EXEMPLARY DAMAGES AS PUNISHMENT

3. (1) Exemplary damages for the purpose of punishment should continue to be available in Ontario, and should be referred to as "punitive damages"

   (2) The determination of the question whether to award punitive damages, and the quantum of such damages, should be constrained by retributivist principles.

4. (1) Punitive damages should be awarded only where the defendant has advertently committed a wrongful act deserving of punishment, and where the defendant's conduct was exceptional.

   (2) Advertent wrongful conduct should comprehend the case where the defendant knew or ought to have known that the act was wrong.

   (3) Exceptional conduct should include not only conduct that is described under the present law as being, among other things, malicious, highhanded, outrageous, or cynical, it should also include conduct engaged in for the purpose of making a profit.

(4) The regime for punitive damages proposed in this report should apply equally to corporations and individuals.

5. (1) The fact that there have been or might be criminal or other similar proceedings against the defendant should not operate as a bar to an award of punitive damages.

(2) In determining the extent, if any, to which punitive damages should be awarded, the court should be entitled to consider the fact and adequacy of any prior penalty imposed in any criminal or other similar proceeding brought against the defendant.

(3) The fact that the defendant has not been charged or prosecuted and the limitation period for criminal or other proceedings has expired should not operate as a bar to a claim for punitive damages.

6. (1) The size of an award of punitive damages should be proportionate to the gravity of the act deserving of punishment.

(2) The present requirement that the punishment be quantified with reference only to the tort committed against the plaintiff should be retained. The award should be made to punish the defendant for the act that caused the plaintiff's injury, and it should be proportionate to that wrong alone.

7. (1) In a trial by judge and jury, the power to quantify an award of punitive damages should remain with the jury.

(2) In the trial of an action for punitive damages, the judge should be empowered to give guidance to the jury concerning the quantum of such damages.

(3) Counsel should have the right to make submissions to the judge or the jury, as the case may be, on the quantum of punitive damages, subject to the trial judge's overriding discretion to control proceedings of the court.

(4) An appellate court should have the power, when setting aside a jury or court assessment of punitive damages, to substitute its own assessment, instead of ordering a new trial, if it thinks this to be just in the circumstances.

8. The present discretion of the courts to control inquiry into the defendant's wealth should continue.

9. Punitive damages should be quantified without regard to the assessment of compensatory damages.

10. The rule requiring the plaintiff to satisfy the ordinary civil burden of proof should be retained.

11. (1) The courts should be directed to develop a rule of vicarious liability that is narrower than the ordinary *respondeat superior* rule used for compensatory damages, such that an employer would be vicariously liable for punitive damages only in the case of complicity, that is, where the employer tacitly approved of the employee's conduct.

    (2) The court should be required to choose between vicarious liability, either for the full amount of punitive damages or for a portion of that amount, or no employer liability for punitive damages.

12. In the case of concurrent wrongdoers, a separate judgment for punitive damages should be entered against each concurrent wrongdoer held liable for such damages.

13. (1) In the event of the death of the plaintiff, a claim for punitive damages should survive for the benefit of the estate.

    (2) In the event of the death of the tortfeasor, a claim for punitive damages should not be permitted against the estate.

CHAPTER 7 TORT RESULTING IN PROFIT: PUNITIVE DAMAGES AND RESTITUTION

14. Where a plaintiff waives a tort committed by the defendant, and pursues a restitutionary remedy, she should also be entitled to claim punitive damages in an appropriate case, that is, where such damages would otherwise be available under the recommendations made in this report.

CHAPTER 8 NEGLIGENCE, NUISANCE, AND EQUITABLE WRONGS

15. The above recommendations respecting damages for injuries to pride and dignity should apply to actions in negligence (see recommendations 1-2).

16. (1) Punitive damages should be available, in accordance with our earlier proposals, in an action for negligence (see recommendations 3-13).

    (2) The plaintiff should be required to prove that she was a victim of such conduct, although she should not be required to prove that she was a specifically targeted victim.

17. Punitive damages should be available, in accordance with our earlier proposals, in cases of nuisance (see recommendations 3-13).

18. Punitive damages should be available, in accordance with our earlier proposals, in cases of equitable wrongs (see recommendations 3-13).

CHAPTER 9 PUBLIC AUTHORITIES

19. The above recommendations respecting damages for injuries to pride and dignity should apply to actions against public authorities (see recommendations 1-2).

20. (1) Public authorities should remain independently liable for punitive damages, in accordance with our recommendations made in respect of punitive damages generally (see recommendations 3-10 and 12-13), where they advertently exceed their legal authority and injure another tortiously.

    (2) Exceptional conduct on the part of the defendant should not be required.

21. The above recommendation regarding vicarious liability, made in connection with punitive damages generally (see recommendation 11), should apply to public authorities.

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RAPPORT
SUR
LES DOMMAGES-INTÉRÊTS EXEMPLAIRES

COMMISSION DE RÉFORME DU DROIT DE L'ONTARIO

SOMMAIRE

Ontario

1991

La Commission de réforme du droit de l'Ontario a été constituée en vertu de la *Loi sur la Commission de réforme du droit de l'Ontario* avec pour mission de réformer le droit, les procédures et les institutions juridiques.

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RÉSUMÉ

Dans son *Rapport sur les dommages-intérêts exemplaires*, la Commission de réforme du droit de l'Ontario cherche à réaliser deux grands objectifs. D'abord, elle veut répondre aux arguments invoqués ces dernières années, qui laissent entendre que les dommages-intérêts exemplaires ou punitifs ont provoqué une crise dans l'application du droit de la responsabilité délictuelle et ce que l'on appelle aussi la «crise de l'assurance». Deuxièmement, elle cherche à rationaliser l'assise théorique des dommages-intérêts exemplaires, pour faire en sorte qu'ils soient accordés en conformité avec des principes bien précis.

L'octroi de dommages-intérêts exemplaires vise d'abord à dissuader le défendeur d'adopter une conduite répréhensible, ou bien à sanctionner une telle conduite. Depuis quelques années, on déplore que le principe des dommages-intérêts exemplaires ait pu provoquer une crise dans le fonctionnement du système de responsabilité délictuelle et dans l'industrie de l'assurance. Les sujets d'inquiétude sont les suivants : (1) des dommages-intérêts exemplaires sont demandés et accordés beaucoup plus souvent qu'autrefois; (2) ils sont demandés et accordés dans des affaires dont les causes d'action sont de plus en plus diverses; (3) les sommes accordées sont plus élevées qu'autrefois; (4) des dommages-intérêts exemplaires sont accordés dans des cas qui ne le justifient pas, ou bien les sommes accordées sont excessives; et (5) les demandes frivoles de dommages-intérêts exemplaires peuvent nuire au processus de règlement, en forçant le défendeur à régler l'affaire, ou bien à la régler pour une somme plus élevée que ce ne serait le cas autrement.

Afin d'étudier ces points et de donner un fondement statistique au présent rapport, une étude empirique a été entreprise au nom de la Commission. Eu égard aux résultats de cette étude et d'autres études effectuées dans le cadre du présent rapport, la Commission en arrive à la conclusion qu'on n'a pas fait la preuve qu'une «crise» a résulté du droit actuel des dommages-intérêts exemplaires. La Commission estime également que, compte tenu des principes juridiques en vigueur en Ontario, il est improbable qu'une telle crise se produise ici.

La Commission fait toutefois plusieurs recommandations en vue de la réforme du droit des dommages-intérêts exemplaires. Ces recommandations ont pour objet d'asseoir le droit en question sur des règles précises, uniformes et rationnelles. Pour atteindre cet objectif, la Commission adopte une démarche fonctionnelle, en isolant les trois fonctions, ou justifications, généralement invoquées pour légitimer l'octroi de dommages-intérêts exemplaires : (1) l'indemnisation; (2) la sanction; et (3) la dissuasion.

La Commission tente d'éclaircir le droit actuel en rendant plus explicites les buts recherchés lorsqu'on accorde des dommages-intérêts exemplaires, et en indiquant expressément les buts généraux que les dommages-intérêts de ce genre devraient être tenus de favoriser.

Le chapitre 2 résume le droit actuel des dommages-intérêts exemplaires, au Canada, en Angleterre et aux États-Unis. On y discute aussi quelques différences importantes entre le droit canadien et le droit américain. Le chapitre 3 décrit les arguments habituellement invoqués pour justifier l'octroi de dommages-intérêts de ce genre ou pour préconiser leur abolition. L'information empirique que l'on peut trouver en Ontario et aux États-Unis sur les dommages-intérêts exemplaires est résumée au chapitre 4.

L'analyse fonctionnelle adoptée par la Commission suggère une démarche claire, qui consiste à exclure entièrement des dommages-intérêts exemplaires la fonction de réparation. Les tribunaux ont déjà tenté d'isoler la fonction de réparation en faisant une distinction entre les dommages-intérêts majorés et les dommages-intérêts exemplaires. Traditionnellement, les dommages-intérêts majorés servent à indemniser le demandeur pour les atteintes portées à son orgueil et à sa dignité par l'inconduite du défendeur, tandis que les dommages-intérêts exemplaires ont pour objet de punir le défendeur et de le dissuader de recommencer. C'est pourquoi l'analyse du chapitre 5 commence non par les dommages-intérêts exemplaires, mais par les dommages-intérêts majorés. La Commission recommande que les atteintes à l'orgueil et à la dignité soient réparées en conformité avec les principes ordinaires de l'indemnisation. Plus précisément, la Commission recommande que le tribunal ait le pouvoir d'octroyer, pour les atteintes à l'orgueil et à la dignité, une compensation qui ferait partie des dommages-intérêts généraux ordinaires pour perte non pécuniaire, et elle recommande qu'une telle compensation puisse être accordée sans que l'on ait apporté la preuve d'une conduite excessive. Nos recommandations visent à faire une distinction plus nette entre la fonction de réparation d'une part et la dissuasion et la sanction d'autre part, et ainsi à éclairer l'analyse ultérieure des dommages-intérêts exemplaires.

Le chapitre 6 présente des considérations générales sur les dommages-intérêts exemplaires comme complément du droit criminel. La fonction première des dommages-intérêts exemplaires a toujours été la sanction, et la Commission recommande que cela demeure. La Commission souscrit à la notion de sanction civile dans les cas exceptionnels, comme complément du droit criminel, et elle reconnaît le caractère symbolique des dommages-intérêts exemplaires. Elle recommande que l'on maintienne le principe des dommages-intérêts exemplaires en Ontario, pour servir de sanction, et que ces dommages-intérêts devraient être appelés «dommages-intérêts punitifs», expression qui donne une idée plus juste de leur objet.

La Commission recommande par ailleurs que des dommages-intérêts punitifs soient accordés seulement lorsque le défendeur a sciemment commis un acte préjudiciable appelant une sanction et que sa conduite a été excessive. Elle recommande aussi que la somme adjugée à titre de dommages-intérêts punitifs soit en rapport avec la gravité de l'acte préjudiciable. Finalement, la Commission fait plusieurs propositions sur une diversité de sujets, notamment l'établissement du montant des dommages-intérêts punitifs, la charge de la preuve, la responsabilité du fait d'autrui, les coauteurs de délits et enfin la survie des revendications.

Au chapitre 7, la Commission traite du «délit commis dans un but lucratif», et elle croit que la décision du demandeur d'engager une action en restitution plutôt qu'en responsabilité délictuelle ne devrait pas faire obstacle à l'octroi de dommages-intérêts punitifs.

Au chapitre 8, on discute certains sujets qui se rapportent à la négligence, à la nuisance et aux actes préjudiciables reconnus en "Equity." La Commission recommande qu'en conformité avec les propositions précédentes, des dommages-intérêts punitifs puissent être accordés dans ces cas. Au chapitre 9, la Commission examine le cas particulier des dommages-intérêts punitifs imposés aux administrations publiques et recommande que celles-ci demeurent, à titre individuel, passibles de dommages-intérêts punitifs lorsqu'elles commettent sciemment un excès de pouvoir préjudiciable à autrui. Finalement, au chapitre 10, la Commission parle des dommages-intérêts extraordinaires en matière contractuelle et en arrive à la conclusion qu'il serait prématuré de faire des recommandations de réforme à ce sujet.

RÉSUMÉ DES RECOMMANDATIONS

La Commission fait les recommandations suivantes :

CHAPITRE 5 INDEMNISATION POUR ATTEINTE À L'ORGUEIL ET À LA DIGNITÉ : AU-DELÀ DES DOMMAGES-INTÉRÊTS MAJORÉS

1. (1) Le tribunal devrait être habilité à accorder une compensation pour les atteintes à l'orgueil et à la dignité en même temps que l'octroi des dommages-intérêts généraux pour perte non pécuniaire.

   (2) Cette compensation devrait pouvoir être accordée pour les délits civils ordinaires, c'est-à-dire sans qu'il ne soit nécessaire d'apporter la preuve d'une conduite excessive.

2. Les dommages-intérêts majorés, au sens que l'on donne à cette expression, devraient être abolis.

CHAPITRE 6 CONSIDÉRATIONS GÉNÉRALES SUR LES DOMMAGES-INTÉRÊTS PUNITIFS : DOMMAGES-INTÉRÊTS EXEMPLAIRES TENANT LIEU DE SANCTION

3. (1) Les dommages-intérêts exemplaires tenant lieu de sanction devraient être maintenus en Ontario et être appelés «dommages-intérêts punitifs».

   (2) C'est en fonction des principes de rétribution que l'on devrait déterminer l'à-propos de dommages-intérêts punitifs et le montant de tels dommages-intérêts.

4. (1) Des dommages-intérêts punitifs devraient être accordés seulement lorsque le défendeur a sciemment commis un acte préjudiciable justifiant une sanction et que sa conduite a été excessive.

   (2) Le cas de conduite préjudiciable délibérée devrait comprendre celui où le défendeur savait ou aurait dû savoir que l'acte était préjudiciable.

(3) La conduite excessive devrait comprendre non seulement la conduite décrite dans le droit actuel comme malicieuse, arbitraire, indigne, brutale ou autre, mais également la conduite adoptée à des fins lucratives.

(4) Le régime proposé dans le présent rapport pour les dommages-intérêts punitifs devrait s'appliquer également aux personnes morales et aux personnes physiques.

5. (1) L'existence ou l'éventualité de poursuites pénales ou autre contre le défendeur ne devrait pas faire obstacle à l'octroi de dommages-intérêts punitifs.

(2) Pour savoir s'il y a lieu d'accorder des dommages-intérêts punitifs, le tribunal devrait pouvoir tenir compte de toute peine antérieure prononcée contre le défendeur dans des procédures pénales ou procédures analogues.

(3) L'absence d'inculpation du défendeur ou de poursuites contre le défendeur, non plus que la prescription pénale, ne devraient faire obstacle à une demande de dommages-intérêts punitifs.

6. (1) La somme accordée à titre de dommages-intérêts punitifs devrait être en rapport avec la gravité de l'acte justifiant la sanction.

(2) On devrait maintenir l'obligation actuelle d'établir la sanction en fonction seulement du préjudice causé au demandeur. L'objet des dommages-intérêts punitifs devrait être de sanctionner le défendeur pour l'acte qui a causé un préjudice au demandeur, et ils devraient être en proportion du seul tort infligé.

7. (1) Dans un procès avec juge et jury, c'est au jury qu'il devrait appartenir d'établir le montant des dommages-intérêts punitifs.

(2) Dans une action en dommages-intérêts punitifs, le juge devrait être habilité à donner des directives au jury en ce qui concerne le montant de tels dommages-intérêts.

(3) Les avocats devraient avoir le droit de faire des observations au juge ou au jury, selon le cas, relativement au montant des dommages-intérêts punitifs, sous réserve du pouvoir prépondérant du juge de première instance quant au déroulement de la procédure.

(4) Un tribunal d'appel devrait, lorsqu'il annule l'évaluation des dommages-intérêts punitifs à laquelle en est arrivé le jury ou le tribunal, être habilité à lui substituer sa propre évaluation plutôt que d'ordonner un nouveau procès, s'il estime que les circonstances le justifient.

8. Le pouvoir actuel des tribunaux de faire procéder à l'examen du patrimoine du défendeur devrait être maintenu.

9. Le montant des dommages-intérêts punitifs devrait être établi sans égard à l'évaluation de l'indemnité compensatrice.

10. La règle qui oblige le demandeur à satisfaire au niveau de preuve requis dans les procès civils devrait être maintenue.

11. (1) On devrait demander aux tribunaux d'établir, en ce qui concerne la responsabilité du fait d'autrui, une règle qui soit plus restrictive que le principe respondeat superior appliqué à l'indemnité compensatrice, de telle sorte qu'un employeur ne répondra des dommages-intérêts punitifs imposés à son employé que lorsqu'il y a eu complicité, c'est-à-dire lorsque l'employeur a tacitement approuvé la conduite de son employé.

    (2) Le tribunal devrait être tenu de choisir, en ce qui concerne l'employeur, soit de le condamner à une partie ou à la totalité des dommages-intérêts punitifs, au titre de la responsabilité du fait d'autrui, soit de ne pas le condamner du tout.

12. Si l'acte dommageable a deux ou plusieurs auteurs, chacun d'eux devrait être condamné séparément à des dommages-intérêts punitifs.

13. (1) Si le demandeur décède, la demande de dommages-intérêts punitifs devrait être transmissible à ses héritiers.

    (2) Si l'auteur du délit décède, ses héritiers devraient être à l'abri d'une demande de dommages-intérêts punitifs.

CHAPITRE 7 DÉLIT COMMIS DANS UN BUT LUCRATIF : DOMMAGES-INTÉRÊTS PUNITIFS ET RESTITUTION

14. Lorsqu'un demandeur renonce à engager une action en responsabilité délictuelle contre le défendeur et requiert plutôt la restitution, il devrait pouvoir réclamer des dommages-intérêts punitifs dans les cas pertinents, c'est-à-dire dans les cas où l'octroi de tels dommages-intérêts serait par ailleurs conforme aux recommandations du présent rapport.

CHAPITRE 8 NÉGLIGENCE, NUISANCE ET ACTES PRÉJUDICIABLES RECONNUS EN EQUITY

15. Les recommandations précédentes qui se rapportent aux dommages-intérêts pour atteintes à l'orgueil et à la dignité devraient s'appliquer aux actions pour négligence (voir les recommandations 1 et 2).

16. (1) Des dommages-intérêts punitifs devraient pouvoir être accordés dans une action pour négligence, conformément à nos propositions antérieures (voir les recommandations 3 à 13).

    (2) Le demandeur devrait être tenu de prouver qu'il a été victime de la conduite reprochée, mais non de prouver qu'il était une victime désignée.

17. Des dommages-intérêts punitifs devraient pouvoir être accordés dans les cas de nuisance, en conformité avec nos propositions antérieures (voir les recommandations 3 à 13).

18. Des dommages-intérêts punitifs devraient pouvoir être accordés dans le cas d'actes préjudiciables reconnus en equity, en conformité avec nos propositions antérieures (voir les recommandations 3 à 13).

CHAPITRE 9 ADMINISTRATIONS PUBLIQUES

19. Les recommandations précédentes relatives aux dommages-intérêts pour atteinte à l'orgueil et à la dignité devraient s'appliquer aux actions engagées contre les administrations publiques (voir les recommandations 1 et 2).

20. (1) Conformément à nos recommandations portant sur les dommages-intérêts punitifs en général (voir les recommandations 3 à 10 et les recommandations 12 et 13), les administrations publiques devraient demeurer, à titre individuel, passibles de dommages-intérêts punitifs lorsqu'elles commettent sciemment un excès de pouvoir préjudiciable à autrui.

    (2) Il ne devrait pas être nécessaire que le défendeur ait eu une conduite excessive.

21. La recommandation antérieure touchant la responsabilité du fait d'autrui et les dommages-intérêts punitifs en général (voir la recommandation 11) devrait s'appliquer aux administrations publiques.

On peut se procurer des exemplaires du présent rapport du Gouvernement de l'Ontario à Publications Ontario, 880, rue Bay, 5e étage, Toronto (Ontario) M7A 1N8. Téléphone (416) 326-5300. Appels sans frais d'interurbain 1-800-668-9938.

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ONTARIO LAW REFORM COMMISSION

Ontario

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Ontario
Law Reform
Commission

The Honourable Howard Hampton
Attorney General for Ontario

Dear Mr. Attorney:

We have the honour to submit herewith our *Report on Exemplary Damages*.

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June 1, 1991

PREFACE

The Project on Exemplary Damages was initiated by the Commission in March, 1988, to examine whether, and to what extent, exemplary, punitive, and aggravated damages serve a rational purpose. Professor Bruce Feldthusen, of the Faculty of Law, University of Western Ontario, was appointed as Project Director. Professor Feldthusen was assisted by a Research Team, which prepared working papers on various topics for the project.[1] In addition to the Project Director, the members of the Research Team were Professor Jeff Berryman, of the Faculty of Law, University of Windsor; Professor Bruce Chapman, of the Faculty of Law, University of Toronto; Professor Nathalie Des Rosiers, of the Faculty of Law, University of Western Ontario; Professor Michael Trebilcock, of the Faculty of Law, University of Toronto; and Professor Neil Vidmar, of the Department of Psychology, University of Western Ontario, and Duke University School of Law. On April 25, 1989, the Research Team presented preliminary drafts of their papers for comment and criticism at a symposium held in London, Ontario, sponsored jointly by the Commission and the Faculty of Law, University of Western Ontario.

The Commission wishes to thank Professor Feldthusen for his Director's Report,[2] the members of the Research Team, and the participants at the symposium, for their valuable contributions to this project, and to express its appreciation to J.J. Morrison, Commission Counsel, who was responsible for completing the Commission's report.

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[1] The following working papers were prepared for the Commission: Berryman, "Exemplary Damages: Teaching the Wrongdoer That Wrong Does Not Pay"; Chapman and Trebilcock, "Punitive Damages: Divergence In Search of a Rationale"; Des Rosiers, "Exemplary Damages as Punishment: The Impact on Public Bureaucracy"; and Vidmar and Feldthusen, "An Empirical Profile of Litigation Involving Exemplary Damage Claims in Ontario".

[2] Many of the recommendations contained in the Director's Report are contained in an article by Professor Feldthusen published subsequent to the submission of his report to the Commission. See Feldthusen, "Recent Developments in the Canadian Law of Punitive Damages" (1990), 16 Can. Bus. L. J. 241.

CHAPTER 1

BACKGROUND

1. THE ORIGIN OF THE PROJECT

Considerable concern has been expressed, over the past several years, that a crisis exists in the operation of the tort system, and that exemplary damages[1] have contributed to this crisis. It has been suggested that exemplary damages are being claimed, and awarded, much more frequently than they were in the past, and that they are being claimed, and awarded, in cases involving increasingly diverse causes of action. It has also been suggested that exemplary damages are being awarded in larger amounts than they once were. Further, it is implied that this is, or may become, cause for concern. For instance, it has been argued that awards of exemplary damages are being given in cases in which they are not justified, or that they are being given in excessive amounts. Moreover, it has been suggested that spurious claims for exemplary damages may have an undesirable effect on the settlement process, by coercing defendants to settle claims, or settle claims for higher amounts, than they would otherwise. Finally, all of this has been said to contribute to the so-called "insurance crisis".

The origin of the present report may be traced to our 1987 *Report on Compensation for Personal Injuries and Death*.[2] In that report, the Commission considered the legal principles governing the assessment of damages awarded for the purpose of providing compensation for personal injuries and death, and made a number of recommendations to ensure that such principles would be fair, reasonable, and consistent. While the initiation of that project "was not linked with any perceived crisis in the operation of the existing tort system, or, more specifically, with any perception of a so-called 'insurance crisis' ",[3] the controversy was certainly not ignored.[4] The Commission declined, in that report, to make recommendations respecting the law of exemplary damages, at least in part on the basis that there was no evidence that exemplary damages were a contributing factor to the alleged "insurance crisis". However, the Commission acknowledged the desirability of initiating a separate project on exemplary damages, in the following terms:[5]

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[1] Terminology is discussed *infra*, this ch., sec. 2.

[2] Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987) (hereinafter referred to as "Report on Compensation"), ch. 9. The topic of exemplary damages has also been mentioned briefly in other Commission reports. See, for example, Ontario Law Reform Commission, *Report on Class Actions* (1982), Vol. 2, at 585-88, and Ontario Law Reform Commission, *Report on Powers of Entry* (1983), at 56-57.

[3] Report on Compensation, *supra*, note 2, at 3.

[4] See, generally, *ibid.*, at 5-10.

> [W]e have concluded that it would be inappropriate, within the specific context of this Report, to consider the case for and against reform of the law of exemplary damages. Although exemplary damages have been identified as a contributing factor to the recent 'insurance crisis' in the United States, there is no evidence that such damages, which have been awarded only rarely in this jurisdiction, have had similar consequences in Ontario. Accordingly, even if it is determined that reform of the law of exemplary damages generally is desirable, there appears to us to be no urgent need to resolve the issue in the context of this Report.
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> [A] review of exemplary damages, limited to the present context of personal injury and death, would be unduly and artificially restricted. In the result, we have concluded that no recommendation ought to be made with respect to exemplary damages in this Report, and that a separate project on exemplary damages might usefully be undertaken by the Commission.

The empirical and other research conducted in connection with the present project confirms the Commission's earlier conclusion that there is no evidence of a "crisis" caused by the existing law of exemplary damages.[6] Moreover, the existing legal principles in Ontario seem adequate to ensure that no crisis, such as allegedly exists in the United States, will arise here in the future.[7] This report, however, does contain a number of recommendations for reform of the law of exemplary damages, summarized below, that will rationalize the theoretical basis of exemplary damages in Ontario, and will ensure that such damages are awarded in accordance with clearly articulated principles.

2. TERMINOLOGY

Exemplary damages should be distinguished from compensatory damages. Whereas compensatory damages are awarded primarily for the purpose of compensating the plaintiff for her pecuniary and non-pecuniary losses suffered as a result of the defendant's conduct, exemplary damages are awarded primarily to deter and punish the defendant. Occasionally, however, exemplary damages are supported on the ground that they compensate the plaintiff for the costs of litigation and other losses for which the plaintiff might not be fully compensated.[8]

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[5] *Ibid.*, at 236.

[6] See *infra*, ch. 4.

[7] See *infra*, ch. 2.

[8] The arguments traditionally advanced for and against exemplary damages are discussed *infra*, ch. 3.

Difficulties in the area of exemplary damages are compounded by the inconsistent use of terminology. Damages intended primarily to punish the defendant have been referred to, often interchangeably, as "aggravated", "deterrent", "exemplary", "penal", "punitive", "retributory", and "vindictive". However, the most common terms, in modern usage, to describe damages that are not compensatory in nature, are "exemplary" and "punitive".[9] The expression "aggravated damages" has caused particular confusion:[10]

> The expression 'aggravated damages', though it has sometimes been used interchangeably with punitive or exemplary damages, has more frequently in recent times been contrasted with exemplary damages. In this contrasting sense, aggravated damages describes an award that aims at compensation, but takes full account of the intangible injuries, such as distress and humiliation, that may have been caused by the defendant's insulting behaviour.

We have attempted to use the term "exemplary damages" for all general references to damages other than compensatory damages. As we discuss below, aggravated damages are compensatory in nature, and would thus be excluded from the term "exemplary damages". We have tried to restrict the use of the term "punitive damages" to situations in which the retributive rationale dominates. The term "extra damages" is used to refer to all damages including aggravated damages, but excluding pecuniary compensatory damages.

3. THE NATURE AND ORGANIZATION OF THE REPORT

This report begins in chapter 2 with an outline of the present law of exemplary damages in Canada, England, and the United States, as well as a discussion of some of the significant differences between the law in Canada and the United States. Chapter 3 contains an outline of the arguments ordinarily advanced for and against the award of exemplary damages. In chapter 4 we summarize the empirical information available about exemplary damages in Ontario and the United States. These three chapters form the necessary foundation for the more specific analysis that follows in the remainder of the report.

Throughout the report, we have adopted a functional approach to the subject of exemplary damages. We have isolated the three functions, or rationales, that typically have been advanced to justify the award of exemplary damages: (1) compensation; (2) punishment; and (3) deterrence. Each of these rationales has implications for the resolution of the specific issues involved in our inquiry. Such issues include, for example, whether, and in what circumstances, exemplary damages should be awarded; the standard of conduct that should be required to justify an award of such damages; the principles that should govern the quantification of the award; and whether there should be vicarious liability in respect of the award. As will become apparent throughout this report, the implications for the various issues differed frequently depending on the specific rationale given for the award.

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[9] Waddams, *The Law of Damages* (1983), para. 979, at 562.

[10] *Ibid.*, at 562-63.

We have attempted to clarify this inherent confusion by making the goals sought to be achieved by an award of exemplary damages more explicit in our legal analysis, and by reducing the number of social goals to which, in our view, exemplary damages ought to be required to respond. We have also attempted to rank in order of priority those goals that we believe might be pursued effectively by exemplary damages.

One obvious approach suggested by a functional analysis is to exclude entirely the compensatory function from the purview of exemplary damages. The legitimacy of the compensatory function in the law of torts is well settled. Indeed, compensatory damages have been the conventional priority of the law of torts. Moreover, the courts have already attempted to isolate the compensatory function of exemplary damages by distinguishing aggravated damages from exemplary damages. Ostensibly, aggravated damages are intended to compensate the plaintiff, while exemplary or punitive damages are intended to punish and deter the defendant. As explained in chapter 5, this attempt by the courts to isolate the compensatory function has not been entirely successful. Therefore, our analysis begins not with exemplary damages, but with aggravated damages. We shall recommend that injuries to pride and dignity should be compensated according to ordinary compensatory principles. Our recommendations are designed to distinguish more sharply the compensatory function from deterrence and punishment, and thus to clarify the subsequent analysis of exemplary damages.

The remaining issue is whether a further award of damages should be made to achieve the additional social goals of punishment or deterrence. Chapter 6 deals with the general case for exemplary damages, as a supplement to the criminal law. The term "punitive damages" is adopted deliberately to convey more accurately the purpose of the award. Historically, the primary function of exemplary damages has been punishment, and we shall recommend that it remain so. We endorse the concept of civil punishment in exceptional cases as a supplement to the criminal law. We also support the symbolic function of punitive damages. The notion that the law of punitive damages should be expanded to make it a more effective regime for punishment, or for deterrence, is rejected. Also considered in chapter 6 is the economic deterrence argument for exemplary damages, as distinct from the incidental deterrent impact of compensatory and punitive damages.

In chapter 7 the Commission deals with the case in which the tortfeasor would profit from the tort, even after paying full compensatory damages to the plaintiff. To this point, the substantive analysis is limited to actions in tort, excluding actions in negligence and nuisance. In chapter 8, special issues that pertain to negligence, nuisance, and equitable wrongs are discussed. In chapter 9 the Commission considers the unique case for imposing punitive damages on statutory public authorities. Finally, in chapter 10, the Commission discusses extra damages in contract.

CHAPTER 2

THE PRESENT LAW: AN OVERVIEW

1. INTRODUCTION

In this chapter, we summarize briefly the basic law of exemplary damages. This is an overview only. More detailed attention is given to specific issues as they arise throughout this report.

The chapter begins with a discussion of the law of exemplary damages in England. While the law in England differs significantly, in some respects, from the law in Canada, it is difficult to understand the latter without first considering the former. The law in Canada is then discussed, followed by a summary of the law in the United States. In the last section of this chapter we identify a number of differences between the law of exemplary damages in the United States and Canada. These differences, as we shall discuss, render many of the concerns respecting exemplary damages articulated in the United States, where much of the recent controversy originated, irrelevant in the Ontario context.

2. ENGLAND

The two earliest exemplary damages cases appear to have been decided in 1763,[1] but the admonitory function of tort law is probably much older.[2] The modern history of exemplary damages, however, begins in 1964 with Lord Devlin's decision in *Rookes v. Barnard*.[3] In that decision, Lord Devlin made it clear that he regarded exemplary damages as an anomaly, and that exemplary damages should be restricted as narrowly as precedent would permit.

First, Lord Devlin drew a distinction between aggravated damages and exemplary damages. The purpose of aggravated damages is to compensate the victim for aggravated injury to "the plaintiff's proper feelings of dignity and pride".[4] However, to obtain an award of aggravated damages it is not sufficient for the plaintiff to prove merely that the defendant's tortious conduct caused an injury to her pride and dignity. In addition, the plaintiff must prove that the injury to pride or dignity was caused by some "exceptional"[5] conduct on the part of the defendant, such as malevolence, spite, or outrageous behaviour.[6] Lord Devlin then reasoned that many of the authorities for exemplary damages were, or could be explained as, awards for the compensatory purpose of aggravated damages.[7]

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[1] *Wilkes v. Wood* (1763), 98 E.R. 489 (K.B.), and *Huckle v. Money* (1763), 95 E.R. 768 (K.B.).

[2] See Henderson, "Punitive Damages in the Modern Civil Justice System: An Anomaly in Need of Change?", on file at the National Headquarters of the American College of Trial Lawyers, at 4.

[3] [1964] A.C. 1129, [1964] 2 W.L.R. 269 (H.L.) (subsequent references are to [1964] A.C.).

In contrast to aggravated damages, Lord Devlin stated that "[t]he object of exemplary damages is to punish and deter".[8] He then held that, with the exception of exemplary damages that are authorized specifically by statute, exemplary damages could be awarded in only two types of case. The first category involves cases in which there has been "oppressive, arbitrary or unconstitutional action by servants of the government".[9] This category was supported by precedent, but it also seemed to enjoy Lord Devlin's approval as a matter of principle. The second category involves cases "in which the defendant's conduct has been calculated by him to make a profit for himself which may well exceed the compensation payable to the plaintiff".[10] It has been suggested that this category was recognized more out of deference to authority than to principle.[11] In explaining his refusal to extend exemplary damages to exceptional conduct generally, Lord Devlin said "I do not care for the idea that in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law".[12]

Lord Devlin then listed three considerations that should govern an award of exemplary damages within the two common law categories. "First, the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour."[13] Second, the remedy should be used with restraint. Third, "the means of the parties . . . are material in the assessment of exemplary damages. Everything which aggravates or mitigates the defendant's conduct is relevant."[14]

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[4] *Ibid.*, at 1221.

[5] In this report, we use the term "exceptional" to refer to the following and other similar common adjectives identified in the case law on exemplary damages.

[6] *Rookes v. Barnard, supra*, note 3, at 1221 and 1229. Many courts in the United States take the same approach. See Schwartz, "Deterrence and Punishment in the Common Law of Punitive Damages: A Comment" (1982), 56 S. Cal. L. Rev. 133, at 140.

[7] See the discussion *infra*, ch. 5.

[8] *Rookes v. Barnard, supra*, note 3, at 1221.

[9] *Ibid.*, at 1226. Public authorities are discussed *infra*, ch. 9.

[10] *Rookes v. Barnard, supra*, note 3, at 1226.

[11] Tort for profit is discussed *infra*, ch. 6, sec. 2(c).

[12] *Rookes v. Barnard, supra*, note 3, at 1230.

[13] *Ibid.*, at 1227. The significance of this consideration is discussed *infra*, this ch., sec. 5.

Lord Devlin's attempt to restrict exemplary damages to two common law categories has been rejected throughout the Commonwealth.[15] Indeed, it was also rejected, originally, by the English Court of Appeal,[16] although it was later affirmed by the House of Lords in *Cassell & Co. Ltd. v. Broome*.[17] In that case, the court approved a rather liberal interpretation of the tort for profit category, thereby making the law in England potentially less restrictive than might otherwise have appeared. However, it was also held that exemplary damages could not be awarded in causes of action where they had not been awarded previously.[18]

3. CANADA

The Supreme Court of Canada has accepted the distinction, drawn in *Rookes v. Barnard*,[19] between aggravated damages, and exemplary or punitive damages.[20] In *Vorvis v. Insurance Corporation of British Columbia*[21] McIntyre J. said the following:[22]

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[14] *Rookes v. Barnard, supra*, note 3, at 1228. These considerations are discussed *infra*, ch. 6, sec. 3.

[15] The Canadian position is discussed *infra*, this ch., sec. 3. With respect to Australia and New Zealand, see, for example, *Uren v. John Fairfax & Sons Pty. Ltd.*, [1967] A.L.R. 25, 117 C.L.R. 118 (H.C.), aff'd [1969] 1 A.C. 590 (P.C.); *Taylor v. Beere*, [1982] 1 N.Z.L.R. 81 (C.A.); *Donselaar v. Donselaar*, [1982] 1 N.Z.L.R. 97 (C.A.); and *Fogg v. McKnight*, [1968] N.Z.L.R. 330 (S.C.).

[16] *Broome v. Cassell & Co. Ltd.*, [1971] 2 Q.B. 354, [1971] 2 All E.R. 187 (C.A.).

[17] [1972] A.C. 1027, [1972] 2 W.L.R. 645 (H.L.) (subsequent references are to [1972] A.C.).

[18] *Ibid.*, at 1080 and 1131.

[19] *Supra*, note 3.

[20] There are no significant differences between the law of exemplary damages in Ontario, and the law in the other common law provinces. For a summary of that law, see, generally, Cherniak and Morse, "Aggravated, Punitive and Exemplary Damages in Canada", in *Special Lectures of the Law Society Of Upper Canada 1983*[:] *Torts in the 80s* (1983) 151; Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), ch. 13; and Waddams, *The Law Of Damages* (1983), ch. 11.

While exemplary damages are not known generally in the civil law of Quebec, they are authorized expressly in the case of an unlawful and intentional interference with a right or freedom recognized in the *Charter of human rights and freedoms*, R.S.Q. 1977, c. C-12, s. 49. Moreover, it would appear that the Commission de Révision du Code Civil has recently recommended the adoption of a regime of punitive damages in a forthcoming revision of the Civil Code. In addition, "moral damages" ("dommages moraux") have been awarded in circumstances similar to those in which aggravated damages have been awarded in common law cases. See Cherniak and Morse, *supra*, at 156.

[21] [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193 (subsequent references are to 58 D.L.R. (4th)). This case is discussed *infra*, ch. 10.

[22] *Ibid.*, at 201-02.

> Punitive damages, as the name would indicate, are designed to punish. In this, they constitute an exception to the general common law rule that damages are designed to compensate the injured, not to punish the wrongdoer. Aggravated damages will frequently cover conduct which could also be the subject of punitive damages, but the role of aggravated damages remains compensatory.
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> Aggravated damages are awarded to compensate for aggravated damage. As explained by Waddams, they take account of intangible injuries and by definition will generally augment damages assessed under the general rules relating to the assessment of damages. Aggravated damages are compensatory in nature and may only be awarded for that purpose. Punitive damages, on the other hand, are punitive in nature and may only be employed in circumstances where the conduct giving the cause for complaint is of such nature that it merits punishment.

While the Supreme Court of Canada has thus approved the distinction between aggravated and exemplary damages enunciated by the House of Lords, it refused to accept that exemplary damages were restricted to the two categories of case set out in *Rookes v. Barnard*.[23] Consequently, it would appear that exemplary damages may be awarded in Canada in any case in which the wrongdoer acts advertently and in an exceptional manner.[24]

Perhaps the most frequently cited passage describing the type of conduct that is required in order to support an award of exemplary damages is from the judgment of Schroeder J.A. in *Denison v. Fawcett*:[25]

> If, in addition to committing the wrongful act, the defendant's conduct is 'high-handed, malicious, conduct showing a contempt of the plaintiff's rights, or disregarding every principle which actuates the conduct of a gentleman', (to quote a few examples taken from the authorities) his conduct is an element to be considered as a circumstance of aggravation which may, depending upon its extent or degree, justify an award to the injured plaintiff in addition to the actual pecuniary loss which he has sustained. I do not think that it can be stated with any precision what may be classed as aggravating circumstances but malice, wantonness, insult and persistent repetition have always been regarded as elements which might be taken into account.

In *Vorvis v. Insurance Corporation of British Columbia*, the majority stated that "punitive damages may only be awarded in respect of conduct which is of such nature as to be deserving of punishment because of its harsh, vindictive, reprehensible and malicious nature".[26] The minority referred as well to "flagrant", "deliberate" and "reprehensible" conduct.[27] Other descriptive adjectives from the cases include: outrageous; contemptuous; evil; callous; brutal; malevolent; and cruel.[28]

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[23] *Ibid.*, at 206.

[24] See, also, *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, [1989] 4 W.W.R. 39. The Supreme Court of Canada affirmed awards of exemplary damages of $3,500 and $3,000 that had been granted in two sexual harassment cases by a human rights adjudicator. In fact, they appear to have been awards of aggravated damages, although no mention of this appears in the subsequent appeals. The adjudicators' awards had been reduced by the Manitoba Court of Queen's Bench and the reduction approved by Huband J.A. in the Court of Appeal. The Supreme Court merely concluded that the amounts were not inordinate in light of the seriousness of the complaints.

[25] [1958] O.R. 312, at 319-20, 12 D.L.R. (2d) 537, at 542 (C.A.).

There is another, and logically prior, condition that must be satisfied in order to support an award of exemplary damages. Ordinarily, the defendant must be an advertent wrongdoer, although the existence of this condition is usually self-evident in the case of exceptional conduct. Intentional wrongs committed in good faith will not support an award of exemplary damages.[29] Generally, a deliberate disregard of the rights of the plaintiff is involved.[30]

Virtually any tortious cause of action may support a claim for exemplary damages.[31] Exemplary damages have been awarded for advertent negligence, and this has received the approval of the Supreme Court of Canada in *Vorvis*.[32] Moreover, a number of Canadian cases have awarded or approved of exemplary damages in contract. However, in *Vorvis*, the Supreme Court of Canada held that there must be independently actionable conduct to support an award of either aggravated or exemplary damages.[33]

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[26] *Supra*, note 21, at 208. McIntyre J. acknowledged that this list of adjectives was not exhaustive of the type of conduct capable of characterizing a punitive award, and added that "in any case where such an award is made the conduct must be extreme in its nature and such that by any reasonable standard it is deserving of full condemnation and punishment": *ibid.*

[27] *Ibid.*, at 224.

[28] See *Rookes v. Barnard, supra*, note 3, at 1229. See, also, Cooper-Stephenson and Saunders, *supra*, note 20, at 693, and Waddams, *supra*, note 20, para. 998, at 571. It has been suggested that such descriptions might be improved by specifying that the conduct must constitute a "flagrant disregard of the plaintiff's rights and extreme departure from the relevant norm". See Owen, "Civil Punishment and the Public Good" (1982), 56 S. Cal. L. Rev. 103, at 115.

[29] But see *Hayward v. F.W. Woolworth Co.* (1979), 23 Nfld. & P.E.I.R. 17, 61 A.P.R. 17 (Nfld. S.C., T.D.) where exemplary damages were awarded for false imprisonment, although the defendants reasonably believed the plaintiff had committed an offence. Perhaps the award is better explained as one of aggravated damages, or simply as "at large" damages for injury to pride and dignity.

[30] The question of extra damages for negligence is discussed *infra*, ch. 8, sec. 2. See, generally, Cherniak and Morse, *supra*, note 20, at 173-76. It would appear that the act must be advertently unlawful, or perhaps recklessly unlawful, as endorsed in *Cassell & Co. Ltd. v. Broome, supra*, note 17, at 1079 *per* Lord Hailsham. However, as indicated in *Robitaille v. Vancouver Hockey Club Ltd.* (1981), 30 B.C.L.R., 286, 124 D.L.R. (3d) 228 (C.A.), such conduct need not have been intended to injure the plaintiff. It should be noted that there are a few Canadian cases that appear to award exemplary damages for negligent or reckless conduct. See Cooper-Stephenson and Saunders, *supra*, note 20, at 694-96, and Waddams, *supra*, note 20, para. 998, at 572.

[31] See Cherniak and Morse, *supra*, note 20, at 169, citing *Denison v. Fawcett, supra*, note 25, and Cooper-Stephenson and Saunders, *supra*, note 20, at 697. In Waddams, *supra*, note 20, para. 1000, at 575, it is noted that punitive damages have been excluded from enticement and related torts.

[32] *Supra*, note 21, at 207. See *infra*, ch. 8, sec. 2.

It is clear that, in Canada, exemplary damages are not restricted to the two categories adopted in *Rookes v. Barnard*. It remains somewhat unclear, however, whether those two categories exist for special treatment in Canada, in addition to the basic rule discussed above, or whether they have been subsumed under the basic rule.[34]

The three conditions that govern an award of exemplary damages outlined by Lord Devlin in *Rookes v. Barnard*, referred to above, have not been challenged in the cases, and appear to be part of Canadian law. First, and perhaps most importantly, the plaintiff must be the victim of the behaviour that is the object of punishment.[35] The conduct to be punished must be the very conduct that constituted the particular tortious wrong. There can be no punishment for objectionable conduct aimed against the plaintiff that is not causally related to that injury.[36] *A fortiori*, the plaintiff cannot extract punitive damages for similar conduct of the defendant that also injured other persons, or exposed others persons to the risk of injury.[37] Awards of exemplary damages, therefore, are generally quite modest.[38] Finally, in assessing the quantum of exemplary damages, the wealth of the defendant is taken into account, although it would appear not to be taken into account in any systematic fashion.[39]

4. UNITED STATES

Of necessity, any summary of the law of exemplary damages in the United States must be expressed in relatively broad terms. Not only might the common law differ amongst the individual state and federal jurisdictions, but most jurisdictions have legislation touching on the subject generally, or on particular sub-issues.[40]

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[33] *Supra*, note 21, at 209. Extra damages in contract are discussed *infra*, ch. 10.

[34] See *infra*, ch. 6, sec. 2(c), and ch. 9.

[35] It appears that punitive damages might be granted without proof of actual loss in cases of torts that are actionable *per se*. See Cooper-Stephenson and Saunders, *supra*, note 20, at 697, and Waddams, *supra*, note 20, para. 1013, at 584. Of course, punitive damages might be needed especially in such cases.

[36] *Guaranty Trust Co. of Canada v. Public Trustee* (1978), 20 O.R. (2d) 247, 87 D.L.R. (3d) 417 (H.C.J.). See, also, *Vorvis*, *supra*, note 21, at 208.

[37] It has been held that the conduct must be aimed specifically at the plaintiff. See *Kaytor v. Lion's Driving Range Ltd.* (1962), 40 W.W.R. 173, 35 D.L.R. (2d) 426 (B.C.S.C.). *Contra*, *Vlchek v. Koshel* (1988), 52 D.L.R. (4th) 371, 44 C.C.L.T. 314 (B.C.S.C.), leave to appeal refused (1988), 52 D.L.R. (4th) 371*n* (B.C.C.A.).

[38] See *infra*, ch. 4, sec. 3. One dramatic exception is the recent decision of the Ontario Court of Appeal in *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65, 59 D.L.R. (4th) 533, discussed *infra*, ch. 7.

[39] See *infra*, ch. 6, sec. 3(d)(ii).

It would appear that, except with respect to negligent conduct, the standard for culpability for punitive damages in most states is similar to the standard in Ontario, that is, advertently caused harm coupled with exceptional (that is, malicious, outrageous, wanton, or fraudulent) motives or conduct. In most cases "willful, wanton or reckless" conduct is required to justify an award of exemplary damages:[41]

> It has long been the rule, in most jurisdictions at least, that punitive damages may be awarded for acts done willfully, wantonly and in reckless indifference to others. Willful, wanton or reckless conduct involves a probability, known to the defendant, that an injury could result. Thus, the defendant's conduct rises to a level of 'conscious indifference' to the consequences of his acts or the plaintiff's rights.

What is less clear, however, is whether "gross negligence" would be sufficient to justify an award. The Second Restatement of the Law of Torts, for example, takes the position that gross negligence is not sufficient.[42] The courts, however, have differed on this issue:[43]

> It is the overwhelming majority rule that punitive damages are not available for mere negligence, just as it is the rule that they are available for intentional, wilful, wanton or reckless conduct. As for 'gross negligence,'—a perplexing term at best—some jurisdictions may permit punitive damages for this category of conduct.

However, since there is often no clear distinction between "willful, wanton or reckless" conduct, on the one hand, and "gross" negligence, on the other,[44] the degree of conduct that is required might be, in substance, the same in either case:[45]

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[40] For a recent survey of the judicial and legislative law of the various state and federal jurisdictions in the United States, see Schlueter and Redden, *Punitive Damages* (2d ed., 1989), Vol. 2, chs. 18 and 19.

[41] *Ibid.*, Vol. 1, § 9.3(A), at 395.

[42] American Law Institute, *Restatement of the Law, Second—Torts 2d* (1979) (hereinafter referred to as "Restatement"), § 908, provides as follows:

> (1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.
>
> (2) Punitive damages may be awarded for conduct that is outrageous, because of the defendant's evil motive or his reckless indifference to the rights of others. In assessing punitive damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

See, also, Restatement, *ibid.*, § 908, comment b.

[43] American College of Trial Lawyers, Committee on Special Problems in the Administration of Justice, *Report on Punitive Damages* (1989), at 11.

> The traditional and majority view allows for punitive damages based on gross negligence where there is an 'entire want of care.' In such cases, the defendant's negligence goes beyond the 'normal fumbling' of ordinary negligence and rises closer to the level of intentional misconduct. Some jurisdictions go so far as to define gross negligence as behavior so closely resembling intentional conduct that it should create the same liability.

Thus, while some courts employ a gross negligence standard, the trend would appear to be towards requiring advertent harm.[46]

A number of legislative initiatives have been taken in the United States in order to limit awards of punitive damages. For example, a number of states have placed a statutory cap on the size of the award available, either by imposing an absolute dollar limit, or by restricting such awards with reference to the award of actual damages.[47] Other states require a higher standard of proof than the ordinary civil burden, requiring that the plaintiff's claim for punitive damages be proved with clear and convincing evidence.[48] In addition, certain jurisdictions require that a portion of the punitive damages award be paid to the state.[49]

Finally, it should also be noted that, in a few states, exemplary damages are not allowed at common law, and statutes limit such claims to particular situations. Moreover, provisions restricting or prohibiting exemplary claims against public authorities are not uncommon.

5. SIGNIFICANT DIFFERENCES BETWEEN CANADA AND THE UNITED STATES

In view of the fact that the law of exemplary damages in the United States appears to be similar to the law in Canada, or, perhaps, even more restrictive, it seems somewhat surprising that awards of exemplary damages have attracted so much more critical attention there in recent years than they have in Canada. The following factors, in our opinion, may account for this phenomenon.

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[44] Keeton, Dobbs, Keeton, and Owen, *Prosser and Keeton on the Law of Torts* (5th ed., 1984), § 34, at 214.

[45] Schlueter and Redden, *supra*, note 40, Vol. 1, § 9.3(A), at 395-96.

[46] Henderson, *supra*, note 2, at 24.

[47] Schlueter and Redden, *supra*, note 40, Vol. 1, § 9.13, at 586.

[48] *Ibid.*

[49] *Ibid.*, at 587.

In the United States, as here, civil punishment has always been moderately controversial. Naturally, the full range of objections to civil punishment is brought to bear on the subject whenever the judiciary or the legislatures confront the prospect of enormous awards. However, it is no coincidence that the most common legislative responses in the United States—that is, statutory caps on the size of punitive damages awards, and sovereign immunity from punitive damages—are ones that stem directly from concerns with quantum.[50] Virtually all of the concern raised in the United States with respect to exemplary damages reduces to a concern with what appear to be inordinately large jury awards. As explained in chapter 4, million dollar awards of exemplary damages are not granted in all jurisdictions, nor are they typical in any jurisdiction. They are, however, highly visible, and highly problematic when they are given. They seem to be quantified with reference to factors beyond mere punishment. They may bankrupt defendants, penalize innocent shareholders, creditors, and compensatory claimants. They may encourage racing to file suit, maintenance and champerty. They may constitute over-deterrence, and thereby discourage useful activity.

With one aberrant exception, nothing approaching a million dollar award has ever been granted in Canada.[51] Moreover, there are significant differences in the law and practice in Ontario that make it highly improbable that unusually high awards will ever materialize here. If this is correct, it suggests that little of the debate in the United States ought to influence law reform in Ontario.

Much of the current debate in the United States centres on "products liability and other accident cases where liability is based on negligence or strict liability—where harm has been done, but not deliberately".[52] Certainly, the imposition of punishment for no-fault strict liability is problematic. However, there is no common law doctrine of strict liability in products liability cases in Ontario. Exemplary damages in Ontario are restricted to cases of advertent harm, or at least to cases where the defendant ought to have known the act was wrong.

Punitive damages for bad faith breach of contract, a doctrine developed and now receding in California, has also generated some large exemplary awards. Recently, the Supreme Court of Canada has virtually precluded both aggravated and punitive damages in contract in Canada.[53]

Even if the scope of exemplary damages in Ontario were to expand significantly into fields such as products liability and contract, and there is no reason to expect this, there are other important differences that would ensure much lower awards here.

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[50] The significance of concern over quantum in the context of sovereign immunity is discussed *infra*, ch. 9, sec. 3(b).

[51] See *infra*, ch. 4, sec. 3. The exception is the $4,800,000 punitive award in *Claiborne Industries Ltd. v. National Bank of Canada*, *supra*, note 38, discussed *infra*, this sec., and ch. 7.

[52] Landes and Posner, "New Light on Punitive Damages" (1986), *Regulation* 33.

[53] *Vorvis v. Insurance Corporation of British Columbia*, *supra*, note 21.

Economic deterrence, as opposed to retributive punishment, figures much more prominently in the legal culture of the United States than in Canada.[54] The deterrence rationale often results in a much higher award than would retributive punishment, especially in the high profile products liability case.[55]

The wealth of the defendant, seldom examined in any systematic fashion in Canadian trials, is often examined in great detail in the United States.[56] Thus, wealth figures more prominently when punitive awards are quantified there. Some assert that the inquiry into wealth prejudices jurors against wealthy defendants. This is a prominent concern in public authority cases.[57]

Exemplary damages are awarded almost invariably by a jury in the United States. Jury awards are less common here. Moreover, perhaps for the reasons given here, and perhaps because of cultural differences, jury awards of exemplary damages tend to be more modest in Canada.

However, most significant is the condition imposed by Lord Devlin in *Rookes v. Barnard*, that "the plaintiff cannot recover exemplary damages unless he is the victim of the punishable behaviour".[58] This is more than a simple standing requirement. It requires that the exemplary award pertain only to the conduct that injured the plaintiff. Although this consideration has been little developed or challenged in Canada, we are aware of only one Canadian case that has violated this consideration to impose a penalty for conduct beyond that that injured the plaintiff. In fact, more restrictive variations of this consideration have been adopted.[59] In our view, this, more than anything else, limits the quantum of exemplary damages awards in Canada. It does so at the cost of rendering exemplary damages relatively ineffective as a vehicle with which to control systematic wrongdoing.[60] For example, if exemplary damages were awarded in a products liability case in Canada, they would be quantified with reference solely to the conduct that injured the specific plaintiff. In contrast, in many cases in the United States, it appears the award is given to deter and punish the defendant for a general course of conduct that injured, or exposed to the risk of injury, many parties other than the plaintiff. This more than anything else has led to large awards, duplicative punishment for the same act or course of conduct, racing to file the first suit, and complex proposals to alleviate these problems.[61]

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[54] See *infra*, ch. 6, sec. 2(b).

[55] For example, if the defendant's net profit for advertent wrongdoing in *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348 (C.A., 4th Dist. 1981), had truly been $125,000,000, as some suggest, an award at least that high, plus an additional amount to take into account the chances of not being held liable, would be needed for effective deterrence. See *infra*, ch. 6, sec. 2(b). Presumably, the sum appropriate to punish the defendant for advertent conduct that caused the plaintiff's injury would be considerably less.

[56] See *infra*, ch. 6, sec. 3(d)(ii).

[57] See *infra*, ch. 9, sec. 3(b).

[58] *Supra*, note 3, at 1227. This was described as an original and valuable contribution in *Cassell & Co. Ltd. v. Broome*, *supra*, note 17, at 1081, *per* Lord Hailsham. To the same effect is a statement by the majority in *Vorvis*, *supra*, note 21, at 206, that "[t]he only basis for the imposition of such punishment must be a finding of the commission of an actionable wrong *which caused the injury complained of by the plaintiff*" (emphasis added).

[59] See *supra*, notes 36 and 37.

The one Canadian exception is *Claiborne Industries Ltd. v. National Bank of Canada*, where the Ontario Court of Appeal awarded $4,800,000 in punitive damages against a bank that was found liable in conspiracy.[62] The facts in that case were sufficiently unusual that, in our view, it should not be considered indicative of an emerging trend in Canada.[63] Moreover, the decision appears to violate the condition endorsed earlier by the Supreme Court of Canada in *Vorvis*,[64] that the award pertain to a wrong done to the plaintiff.

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[60] This is discussed *infra*, ch. 8, sec. 2.

[61] American College of Trial Lawyers, *supra*, note 43, at 20-27.

[62] *Supra*, note 38. This case is discussed *infra*, ch. 7.

[63] See the Ontario empirical data, discussed *infra*, ch. 4, sec. 3.

[64] See *supra*, note 58.

CHAPTER 3

ARGUMENTS FOR AND AGAINST EXEMPLARY DAMAGES

In this chapter we set out the arguments ordinarily advanced for and against the award of exemplary damages. The theoretical context established in this chapter will serve to inform the discussion throughout the remainder of this report. In a later chapter[1] we will state our conclusions, and respond to a number of the arguments raised here.

As we pointed out in our 1987 *Report on Compensation for Personal Injuries and Death*,[2] "[t]he primary argument in favour of exemplary damages begins with the assertion that, in addition to compensation, both deterrence and punishment are legitimate objectives of tort law".[3] Conduct that is sufficiently reprehensible as to warrant punishment by the court might not constitute a criminal offence. Alternatively, such conduct, although criminal, might not be prosecuted, either because the circumstances do not justify prosecution or because the injured party does not wish to invoke the criminal process. Finally, even though such conduct might constitute an offence, and a criminal prosecution is brought, the wrongdoer might not be punished, or might not be punished adequately. Consequently, where egregious conduct comes to the attention of a civil court during the course of a private action, the ability of the court to punish the wrongdoer enables the court to compensate for certain limitations inherent in the criminal justice system. Moreover, by expressing its condemnation of socially intolerable behaviour, and punishing the defendant, the court attempts to deter the wrongdoer and others from engaging in similar conduct in the future.

Exemplary damages have also been justified as a means of preventing unjust enrichment in cases in which the profit or gain realized by the defendant, as a result of the misconduct, would exceed the compensation that the defendant would be required to pay to the plaintiff. In such cases, the deterrent effect ordinarily inherent in an award of compensatory damages would clearly be inadequate.

It has also been argued that the potential of receiving an award of exemplary damages provides a desirable incentive to the initiation of private litigation. The availability of such damages is said to provide the victim with "an incentive to pursue litigation he might otherwise forego, and society benefits by being able to deter undesirable conduct that for one reason or another it chooses not to punish by criminal sanctions, or which escapes the notice of public prosecutors who are occupied with more serious matters".[4]

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[1] See *infra*, ch. 6, secs. 2(c) and 3.

[2] Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987) (hereinafter referred to as "Report on Compensation").

[3] *Ibid.*, at 231.

Finally, it has also been argued that the ability to award exemplary damages enables the court to relieve the innocent plaintiff of the burden of certain losses or expenses that would otherwise remain uncompensated. For example, notwithstanding the court's desire to award full compensation for all of the plaintiff's losses, certain losses, particularly those that are non-pecuniary, may remain uncompensated or may be compensated only partially. Moreover, in most cases a successful plaintiff will recover only a portion of her legal costs. It is argued that "a 'malicious' wrongdoer should not be permitted with impunity to impose such a burden on an innocent plaintiff",[5] and exemplary damages provides the court with one means by which to remedy this inequity.

As we noted in our Report on Compensation, "[t]he case against exemplary damages is founded largely upon the assertion that punishment and deterrence are objectives that belong exclusively within the jurisdiction of criminal law".[6] However reprehensible the defendant's conduct might be, if the conduct does not constitute a criminal offence, it is because the Parliament of Canada has chosen not to constitute it an offence. In these circumstances, it is argued, a civil court ought not to be permitted, in effect, to create its own offence. "[I]n Canada, where the criminal law is reserved exclusively for Parliament, which has expressly abolished common law crimes, there seems even greater reason than in other jurisdictions for the courts to refrain from creating new crimes in civil cases".[7]

Where the conduct in question does constitute a criminal offence,[8] but the decision is made not to prosecute the defendant, it is argued that a civil court ought not to be permitted to review the discretion of the Crown prosecutors. Similarly, if the defendant has been prosecuted, and has been either discharged or punished lightly, a civil court ought not to be permitted, in effect, to review the decision of a criminal court. If the wrongdoer has been acquitted in a criminal prosecution, it is argued that punishment ought not to be imposed in a subsequent civil proceeding. Finally, where a wrongdoer has been punished by the criminal law, additional punishment ought not to be imposed in a civil proceeding. In all these cases it may be argued that the defendant would be subjected to double jeopardy for a single offence.

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[4] Ingram, "Punitive Damages Should be Abolished" (1988), 17 Cap. U.L. Rev. 205, at 210-11.

[5] Fridman, "Punitive Damages in Tort" (1970), 48 Can. B. Rev. 373, at 400.

[6] *Supra*, note 2, at 232.

[7] Waddams, *The Law of Damages* (1983), para. 982, at 564.

[8] Of course, the following arguments apply equally to provincial offences.

Exemplary damages have also been criticized on the basis that, although the effect of such damages is to impose a criminal sanction, they are imposed without the protections afforded to an accused in a criminal proceeding. Thus, for example, the defendant is denied the presumption of innocence and the right against self-incrimination. Liability for exemplary damages is imposed on the basis of the ordinary civil burden of proof, that is, on a balance of probabilities, rather than the criminal burden, which requires proof beyond a reasonable doubt. Further, there is no clear definition of the "offence" alleged to have been committed by the defendant, or the penalty to which the defendant might be liable. There is no right to have the penalty imposed by a judge, and where the penalty is imposed by a jury, the only effective means to have the penalty reconsidered is to seek a re-trial.

Finally, it is argued that exemplary damages constitute a windfall to the plaintiff. Assuming that punishment and deterrence are legitimate goals of civil law, it is "totally inappropriate for plaintiffs, rather than society as a whole, to receive the windfall that a punitive damages 'fine' represents".[9]

The various arguments against exemplary damages were summarized by Lord Reid in *Cassell & Co. Ltd. v. Broome*:[10]

> [T]he plaintiff, by being given more than on any view could be justified as compensation, was being given a pure and undeserved windfall at the expense of the defendant, and . . . in so far as the defendant was being required to pay more than could possibly be regarded as compensation he was being subjected to pure punishment.
>
> I thought and still think that that is highly anomalous. It is confusing the function of the civil law which is to compensate with the function of the criminal law which is to inflict deterrent and punitive penalties.
>
> . . .
>
> I think that the objections to allowing juries to go beyond compensatory damages are overwhelming. To allow pure punishment in this way contravenes almost every principle which has been evolved for the protection of offenders. There is no definition of the offence except that the conduct punished must be oppressive, high-handed, malicious, wanton or its like – terms far too vague to be admitted to any criminal code worthy of the name. There is no limit to the punishment except that it must not be unreasonable. The punishment [in a case tried by jury] is not inflicted by a judge who has experience and at least tries not to be influenced by emotion: it is inflicted by a jury without experience of law or punishment and often swayed by considerations that every judge would put out of his mind. And there is no effective appeal against sentence. . . . It is

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[9] Ingram, *supra*, note 4, at 211.

[10] [1972] A.C. 1027, at 1086-87, [1972] 2 W.L.R. 645, at 682 (H.L.).

> no excuse to say that we need not waste sympathy on people who behave outrageously. Are we wasting sympathy on vicious criminals when we insist on proper legal safeguards for them? The right to give punitive damages in certain cases is so firmly embedded in our law that only Parliament can remove it. But I must say that I am surprised by the enthusiasm of Lord Devlin's critics in supporting this form of palm tree justice.

As we noted earlier,[11] this report contains a number of recommendations for reform of the law of exemplary damages. These recommendations, in our view, will rationalize the theoretical basis of exemplary damages in Ontario, and will ensure that such damages are awarded in accordance with clearly articulated principles. Our specific conclusions in respect of the arguments raised here are discussed throughout the remainder of the report.

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[11] *Supra*, ch. 1, sec. 1.

CHAPTER 4

THE EMPIRICAL EVIDENCE

1. INTRODUCTION

A great deal of concern about exemplary damages stems from anecdotal evidence. As we noted earlier in this report,[1] one hears that exemplary claims are much more frequent than they were in the past, and that they are dispersed over an increasing number of causes of action. One hears also that awards of exemplary damages are more common, more dispersed, and larger than they once were. It is further implied that this is, or may be, cause for concern. For example, some believe that spurious exemplary damages claims have an undesirable effect on the settlement process. Some believe that awards are given in cases in which they are not justified, or that they are given in excessive amounts.

In our view, little credence should be given to these anecdotal claims. In general, they tend to be based on aberrant, high-profile experiences. Moreover, they seem, like so many other claims for tort reform, to originate largely in the United States. It is debatable whether these concerns are justified by the empirical research conducted in the United States. To the extent that they are, there are many reasons to believe that they will not manifest themselves in Canada.[2] No Ontario counsel who participated in the symposium held in conjunction with the Commission's project, nor any who responded to our inquiries, offered any support for these anecdotal concerns.

2. THE UNITED STATES DATA

The data most frequently relied upon in the United States were compiled by the Rand Institute.[3] The main study considered cases in Cook County, Illinois (the Chicago metropolitan area), and San Francisco County from 1960 to 1984.

The authors found that punitive awards in personal injury cases, including automobile accident, products liability, and malpractice cases, were extremely rare. Although high awards in products liability cases are often cited as evidence of a crisis in punitive damages law, they seem to occur only rarely. Punitive awards in the business tort and contract cases increased markedly in number during the early 1980s. Much of this increase, especially in California, can be attributed to claims for bad faith breach of contract, which accounted for about one quarter of all punitive awards between 1980 and 1984. Interestingly, the same decrease in punitive awards in intentional tort cases found in Ontario[4] also appeared in the California study. The median and average size of the punitive award increased from 1960-64 to 1980-84, although adjustments for inflation make this a less dramatic increase than appears at first. Another striking finding is the substantial difference between the median and average awards in all categories of case. This suggests that the high-profile million-dollar awards are not typical.

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[1] *Supra*, ch. 1, sec. 1.

[2] See *supra*, ch. 2, sec. 5.

[3] Peterson, Sarma, and Shauley, *Punitive Damages: Empirical Findings* (1987).

Other research based on jury verdicts from forty-two counties in ten states indicates significant variation from state to state.[5] In general, however, the authors conclude that awards of punitive damages are far from routine.[6] They also observe that median awards in most sites are low – below $50,000 (1980 dollars).[7] They found that while the chances of success in a products liability or malpractice suit were less than even, those who did obtain an award of punitive damages in cases of this type obtained a very large award. For example, in eight of eleven reported products liability verdicts, the total awards, including both compensatory and punitive damages, were in excess of $1,000,000. The authors stress that general reform should not be based on these aberrant cases.[8]

3. THE ONTARIO DATA

In order to investigate the anecdotal concerns, and to develop an empirical basis for this report, an empirical study was undertaken on behalf of the Commission of reported cases from the past twenty-six years; court files; court minute books; and comments solicited from the legal profession. How the findings are interpreted is necessarily subjective. The research cannot disclose whether there are "too many" claims or awards, or whether awards are "too high". No standards exist against which to measure such claims. In the opinion of the Commission, however, the findings offer no support for the contention that there is, or will be, a "crisis" in exemplary damages claims, either in an absolute sense, or relative to claiming and award patterns in the past.

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[4] See *infra*, this ch., sec. 3.

[5] Daniels and Martin, *Empirical Patterns in Punitive Damage Cases: A Description of Incidence Rates and Awards*, prepared for the American Bar Foundation and presented at the Law and Society Assoc. Annual Meeting, June, 1987.

[6] Missouri had the highest rate, 22% of all successful verdicts; New York had the lowest rate, 2.2%: *ibid.*, at 10.

[7] *Ibid.*, at 6.

[8] Daniels, *Punitive Damages: Storm On The Horizon?*, preliminary report delivered at American Bar Foundation Fellows Seminar, 1986, at 17-18.

The study does indicate that exemplary awards are rare. From 1962 to 1987, the Ontario Reports disclosed only fifteen awards, or roughly one every second year. Exemplary awards were made in 1.5 percent of all selected civil claims, excluding matrimonial, reported during the period. This pattern remained relatively constant throughout the period.

Despite the high profile enjoyed by exemplary damages claims in contract, only two such awards were reported, representing one percent of all actions in contract. No successful claims for exemplary damages were found in negligence.[9] If contract and negligence cases are excluded, exemplary damages were awarded in 10.5 percent of all reported selected civil cases excluding matrimonial. Interestingly, the proportion of "traditional" intentional tort cases in which an exemplary damages award was obtained declined by almost one half from the first thirteen years to the last.

The largest award, made in 1982, was for $50,000.[10] There were two $35,000 awards, in 1964[11] and 1980[12] respectively, and one $25,000 award, in 1984.[13] Others awards were much smaller.

The empirical study also investigated, in the court records, the rate at which exemplary damages are claimed, and changes in that rate over time. These may be relevant in two respects. First, they may foretell changes in award patterns in the future. Second, the claims themselves may cause undesirable distortions in settlement and litigation.

Files in Middlesex County from 1980 to 1987 revealed that exemplary damages claims in the adjusted sample, that is, all selected civil cases excluding matrimonial, remained constant at a rate of approximately 7.5 percent per year. In York County, however, claims in the adjusted sample increased by approximately sixty percent from 1984-85 to 1986-87, to a high of more than seventeen percent.

In the reported cases, exemplary damages were claimed twice as often in the last thirteen years than in the first thirteen, but still in five percent of selected causes of action only. However, the more recent claims succeeded much less often, so that the increase in exemplary damages claims did not produce proportionally more awards. If that pattern were to hold for York County in 1986-87, the higher claiming rate would be offset by a lower success rate.

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[9] Nor were any additional successful claims in contract or negligence found in the minute books. A punitive award of $1,000 was made in negligence in *Apa v. McKay*, unreported (Sept. 1984, Ont. H.C.J.).

[10] *Captain Developments Ltd. v. Nu-West Group Ltd.* (1982), 37 O.R. (2d) 697, 136 D.L.R. (3d) 502 (H.C.J.), rev'd (1984), 45 O.R. (2d) 213, 6 D.L.R. (4th) 179 (C.A.), leave to appeal to the S.C.C. refused (1984), 4 O.A.C. 78, 55 N.R. 273 (S.C.C.) (slander of title).

[11] *Platt v. Time International of Canada Ltd.*, [1964] 2 O.R. 21, 44 D.L.R. (2d) 17 (H.C.J.), aff'd [1965] 1 O.R. 510*n*, 48 D.L.R. (2d) 508*n* (C.A.) (defamation).

[12] *Pro Arts, Inc. v. Campus Crafts Holdings Ltd.* (1980), 28 O.R. (2d) 422, 110 D.L.R. (3d) 366 (H.C.J.) (copyright).

[13] *Pilato v. Hamilton Place Convention Centre Inc.* (1984), 45 O.R. (2d) 652, 7 D.L.R. (4th) 342 (H.C.J.) (wrongful dismissal).

Claims for exemplary damages in contract in the reported cases have increased from 1984 to 1987 and were made in fifteen percent of all contract cases (ten percent, excluding contracts of insurance). Awards in contract cases increased at a faster rate.

The dramatic increase in exemplary damages claims in York County in 1986-87 can be traced to a dramatic increase in the number of claims in contract and negligence. If the pattern from the reported cases held, an even greater increase in awards might have been predicted as the contract cases work their way through the courts. However, the Supreme Court of Canada's decision in *Vorvis v. Insurance Corporation of British Columbia*[14] suggests that fewer, not more, awards of exemplary damages in contract will occur in the future. There have been no reported awards in negligence, although some can be expected based on decisions in other provinces. Whether either trend is problematic depends on the substantive case for exemplary damages in contract and negligence, considered later in this report. At this point, it is expected that the increase in claims for exemplary damages found in York County will not produce a corresponding increase in awards of exemplary damages, especially in contract.

Finally, it remains to consider whether claims for exemplary damages are problematic even when they seldom culminate in a judicial award. If so, the fact that exemplary damages are claimed in thirty-three percent of all contract cases in York County, for example, might be a matter of some concern. On this question, we were required to rely on anecdotal evidence provided by several practising lawyers. None of the lawyers felt that spurious claims had any effect whatsoever. One plaintiff's lawyer admitted to claiming exemplary damages frequently, and felt that such claims were effective. He also expressed the view that exemplary damages should be awarded more often and in higher amounts than they are, so, in his view at least, these claims were not spurious. Anecdotal concerns that such claims were used to obtain broader discovery were countered by lawyers who believed that the discovery process was effectively controlled by the courts. While it has been suggested[15] that the possibility of exemplary damages for insurer bad faith claims[16] has influenced insurers to settle claims they would not have settled

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[14] [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193.

[15] See, for example, Cherniak, "Punitive Damages in Canada: Business Beware" (1984), 1 Bus. & L. 30.

[16] Insurer bad faith claims are described in Cherniak and Morse, "Aggravated, Punitive and Exemplary Damages in Canada", in *Special Lectures of the Law Society of Upper Canada 1983*[:] *Torts in the 80s* (1983) 151, at 186, in the following terms:

> There is a considerable body of law in the United States dealing with the obligation of an insurer to act in good faith toward its insured in honouring claims of its insured,

otherwise,[17] responses to the Commission's inquiries indicated that insurers were able to distinguish meritorious claims and discount others.

In summary, the empirical research conducted on behalf of the Commission is consistent with the observation made in the Commission's *Report on Compensation for Personal Injuries and Death* that "[a]lthough exemplary damages have been identified as a contributing factor to the recent 'insurance crisis' in the United States, there is no evidence that such damages, which have been awarded only rarely in this jurisdiction, have had similar consequences in Ontario".[18] Insofar as actual awards are concerned, they are rare by any standard, and there is no evidence that they are becoming more common. Expansion into new areas such as contract and negligence has been trivial, and accompanied by a contraction in traditional areas. The one change in claims made in York County does not seem to promise a significant change in the number of awards of exemplary damages. Nor is there any evidence from the lawyers with whom we consulted that spurious claims have any significant effect on litigation or outcome. With the exception of the decision in *Claiborne Industries Ltd. v. National Bank of Canada*,[19] there has been nothing close to a million-dollar award.[20] Indeed, no reported case evidences an award close to the cap recommended in the United States.[21] Nor, except for *Claiborne*, has an Ontario court exceeded the award of £25,000 upheld in England by the House of Lords, where exemplary damages law is more restrictive.[22] On balance, awards of exemplary damages in Ontario continue to be an exceptional remedy given in relatively modest amounts. Thus, it does not appear that the case for and against awards of exemplary damages has been affected by developments in the 1980s.

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i.e., first party claims, and settling a claim against the insured when it exceeds the policy limits of the insured with the insurer, i.e., third party claims.

The consequence of failing to abide the good faith requirement in both situations is to pay damages that are both compensatory and punitive.

[17] Unless there is a problem with the substantive determination of bad faith, perhaps this is as it should be.

[18] Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987), at 236.

[19] (1989), 69 O.R. (2d) 65, 59 D.L.R. (4th) 533 (C.A.).

[20] In *Claiborne Industries Ltd. v. National Bank of Canada*, *ibid.*, an award was made for $4,800,000 in punitive damages. This is discussed *infra*, ch. 7.

[21] See American College of Trial Lawyers, Committee on Special Problems in the Administration of Justice, *Report on Punitive Damages* (1989), at 15. The College recommended a cap of twice the compensatory award, or $250,000, whichever is greater.

[22] *Cassell & Co. Ltd. v. Broome*, [1972] A.C. 1027, [1972] 2 W.L.R. 645.

CHAPTER 5

COMPENSATION FOR INJURY TO PRIDE AND DIGNITY: BEYOND AGGRAVATED DAMAGES

As mentioned in chapter 1, exemplary damages are best analyzed by isolating the functions that they perform. In this chapter we isolate the compensatory function, with a view to removing it altogether from the purview of exemplary damages. This is, of course, similar to the distinction made between aggravated and exemplary damages. However, for the reasons given below, it goes somewhat further.

The most ambitious attempt to solidify the distinction between aggravated and exemplary damages was made by Lord Devlin in *Rookes v. Barnard*.[1] His decision in that case must be understood in the context in which it was rendered. Lord Devlin regarded the practice of awarding exemplary damages as an anomaly; one that should be restricted and tightly controlled. There existed, however, a substantial body of English case law that authorized exemplary awards. His decision was directed, in part, at criticizing some of these earlier authorities and, in part, at explaining some of them in a manner consistent with the restrictions he wished to impose. His treatment of aggravated damages was part of this second enterprise.

Essentially, Lord Devlin's argument was that many of the authorities supporting awards of exemplary damages either were, or could have been, justified as awards of aggravated damages. Aggravated damages are merely a particular type of compensatory general damages, legitimate in their own right, as part of the standard compensatory function of tort law. The purpose of aggravated damages is to compensate the victim for aggravated injury to "the plaintiff's proper feelings of dignity and pride".[2] "Their purpose is compensatory and, being compensatory, they properly form part of a general damage award."[3] Thus, an award of aggravated damages does not raise the concern, expressed by Lord Devlin with respect to exemplary damages, that "in matters criminal an aggrieved party should be given an option to inflict for his own benefit punishment by a method which denies to the offender the protection of the criminal law".[4]

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[1] [1964] A.C. 1129, [1964] 2 W.L.R. 269 (H.L.) (subsequent references are to [1964] A.C.).

[2] *Ibid.*, at 1221.

[3] *Walker v. CFTO Ltd.* (1987), 59 O.R. (2d) 104, at 111, 37 D.L.R. (4th) 224, at 231 (C.A.).

[4] *Rookes v. Barnard, supra*, note 1, at 1230.

Despite some earlier views to the contrary,[5] it is now clear that the Canadian courts have accepted the distinction between aggravated and exemplary damages.[6] Some judges are scrupulously careful to itemize their awards accordingly, sometimes awarding one, sometimes the other, and sometimes both. Other judges do not draw the distinction explicitly, and often give an undifferentiated award appearing to employ the terms "aggravated" and "exemplary" synonymously.[7] Aggravated damages awards are virtually always treated as exceptional, rather than as relatively uncontroversial portions of the compensatory award.

It is not surprising that a clear distinction is not always drawn by the courts between aggravated and exemplary damages. Nor is it surprising that aggravated damages have failed to become an unexceptional head of compensatory damages. Some commentators believe that the distinction made by Lord Devlin is unworkable.[8] The continuing inability or unwillingness of courts to draw a clear distinction between aggravated and exemplary damages reflects the fact that the two awards have more in common than Lord Devlin's decision in *Rookes v. Barnard*[9] would seem to indicate.

As we noted earlier in this report,[10] to obtain an award of aggravated damages it is not sufficient that the plaintiff prove that the defendant's tortious conduct caused an injury to pride and dignity, as would be the case were aggravated damages merely a variation of ordinary compensatory damages. In addition, the plaintiff must prove that the injury to pride or dignity was caused by some exceptional conduct, such as malevolence, spite, or outrageous conduct, on the part of the defendant.[11] In other words, to trigger an award of aggravated damages Lord Devlin would require proof of precisely the same type of conduct on the part of the defendant as would trigger an award of exemplary damages in Canada. Thus, the rules that govern aggravated damages cannot be explained solely by reference to compensatory principles.

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[5] Originally the courts declined to draw the distinction. See, for example, *S. v. Mundy*, [1970] 1 O.R. 764, at 768, 9 D.L.R. (3d) 446, at 450 (Co.Ct.).

[6] *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085, at 1098-99, 58 D.L.R. (4th) 193, at 201, and *Gouzenko v. Lefolii*, [1967] 2 O.R. 262, at 268, 63 D.L.R. (2d) 217, at 223 (C.A.), varied [1969] S.C.R. 3, 70 D.L.R. (2d) 337.

[7] One would expect the distinction to be firmly established after *Vorvis v. Insurance Corporation of British Columbia*, *supra*, note 6. However, some confusion appears to linger in the minority judgment in that case. See, also, the discussion of *Janzen v. Platy Enterprises Ltd.*, [1989] 1 S.C.R. 1252, [1989] 4 W.W.R. 39, *supra*, ch. 2, note 24.

[8] See, for example, Fridman, "Punitive Damages in Tort" (1970), 48 Can. B. Rev. 373, at 388, and Ogus, *The Law of Damages* (1973), at 238.

[9] *Supra*, note 1.

[10] *Supra*, ch. 2, sec. 2.

[11] *Rookes v. Barnard*, *supra*, note 1, at 1221 and 1229. Many courts in the United States take the same approach. See Schwartz, "Deterrence and Punishment in the Common Law of Punitive Damages: A Comment" (1982), 56 S. Cal. L. Rev. 133, at 140.

The rules that Lord Devlin adopted to govern the award of aggravated damages fail to exclude entirely the goal of compensation from the purview of exemplary damages. Indeed, it is doubtful whether he intended them to do so. In part, his conception of aggravated damages was as a device that enabled him to rationalize earlier decisions. In part, the concerns that Lord Devlin had with using the civil law to punish misconduct were mitigated to the extent that aggravated damages would respond to, and would be quantified with reference to, an actual loss, which, of course, is a traditional function of tort law. Regardless of Lord Devlin's intentions, the category of aggravated damages contains ambiguous and incompatible social goals: on the one hand seeking to compensate the plaintiff, while on the other hand seeking to punish or deter exceptional wrongful conduct. It is no surprise, therefore, that the distinction has proven to be problematic.

There can be little doubt that a true injury to pride or dignity is worthy of legal protection. Historically, non-trivial injuries to pride and dignity have been regarded as worthy of the protection of the law of torts.[12] If the law of torts is intended to provide redress for private wrongs, so that individuals will not resort to violence, a response to injured feelings is particularly needed. Full compensation for real injury is a prerequisite for effective deterrence.[13]

The interesting question, then, is why injured feelings are not compensated in all tort cases in which they occur. The answer likely lies in a combination of factors. First, it may be difficult to determine that such an injury has occurred. Second, it is impossible to quantify such an injury with any degree of accuracy. Finally, it may be expensive to attempt to answer these intractable questions. The benefits of increasing the tortfeasor's damages accordingly, especially given the risk of error, may be thought to be less than the costs of doing so. When damages are awarded for outrageous conduct that aggravates the plaintiff's loss these arguments are less compelling. The more outrageous the conduct, the more likely it is that the injury to feelings is real, and the less expensive it is to reach that conclusion. While precise quantification of the loss remains impossible, there is greater certainty that it is not trivial.

On balance, the Commission has concluded that the disadvantages of requiring exceptional conduct on the part of the defendant as a condition of compensation outweigh the advantages. Legitimate injuries to pride and dignity may occur regardless of how exceptional the conduct is. More importantly, as long as the courts are required to employ the same standard of conduct to trigger both a compensatory award and an exemplary award, confusion will remain with respect to both aggravated and exemplary damages.

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[12] See Malone, "Ruminations on the Role of Fault in the History of the Common Law of Torts" (1970), 31 La. L. Rev. 1, at 2, and Ellis, "Fairness and Efficiency in the Law of Punitive Damages" (1982), 56 S. Cal. L. Rev. 1, at 15-17.

[13] See Schwartz, *supra*, note 11, at 140. For a more detailed discussion of economic deterrence, see *infra*, ch. 6, sec. 2(b).

The Commission has concluded, therefore, that the question of injury to pride and dignity should be approached from a purely compensatory perspective. Specifically, the Commission recommends that the court should be empowered to award compensatory damages for injuries to pride and dignity as part of the ordinary global award of damages for non-pecuniary loss.[14] Such damages, therefore, would be subject to the limit imposed by the Supreme Court of Canada for non-pecuniary damages.[15] The Commission further recommends that damages for injuries to pride and dignity should be available for ordinary tortious conduct, that is, without proof of exceptional, malevolent, spiteful, or outrageous conduct (as is now required for an award of both aggravated and exemplary damages). Finally, the Commission recommends that aggravated damages, as they are currently understood, should be abolished.

In theory, the above recommendations constitute an expansion of the rules governing compensatory damages. Of course, to the extent that our recommendations will permit an award of damages for real injuries that currently remain uncompensated, this is entirely justifiable as a matter of principle. However, it is unlikely, in our view, that our recommendations will have such an expansive effect. First, there are a number of cases that already take the approach recommended, and permit compensation for injury to feelings.[16] More importantly, however, at present, some measure of compensation for injury to pride and dignity is often awarded, in the ordinary case, as part of the damages for pain and suffering, and loss of amenities (or loss of enjoyment of life). Accordingly, additional awards of compensation for injuries to pride and dignity will likely remain rare, particularly where such injuries are unaccompanied by exceptional conduct on the part of the defendant. Where such injuries are accompanied by exceptional conduct, a remedy already exists. The real effects of our proposals are that they will render less central the question of exceptional conduct for matters of compensation, and they will remove the question of compensation from the notion of exemplary damages.

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[14] As to the nature and role of compensation for non-pecuniary loss, see Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987), ch. 3.

[15] A "rough upper limit" of $100,000, in 1978 dollars, was established by the Supreme Court of Canada for non-pecuniary losses in the so-called trilogy of cases: *Andrews v. Grand & Toy Alberta Ltd.*, [1978] 2 S.C.R. 229, 83 D.L.R. (3d) 452; *Arnold v. Teno*, [1978] 2 S.C.R. 287, 83 D.L.R. (3d) 609; and *Thornton v. Board of School Trustees of School District No. 57 (Prince George)*, [1978] 2 S.C.R. 267, 83 D.L.R. (3d) 480.

[16] This is obviously so in a case of defamation. For a clear statement to this effect, see *Ley v. Hamilton* (1935), 153 L.T. 384, at 386, 79 Sol. J. 573, at 575 (H.L.). It is true in other actions as well. See, for example, McGregor, *McGregor on Damages* (15th ed., 1988), para. 89, at 49, on assault and malicious prosecution. A number of Australian cases on point are cited in Luntz, *Assessment of Damages for Personal Injury and Death* (2d ed., 1983), at 71-72. See, also, *Ravary v. The Grand Trunk Railway Co. of Canada* (1860), 6 R.J.R.Q. 69 (Q.B. in Appeal).

CHAPTER 6

THE GENERAL CASE FOR PUNITIVE DAMAGES: EXEMPLARY DAMAGES AS PUNISHMENT

1. INTRODUCTION

In the previous chapter we recommended that a plaintiff should be permitted to recover compensatory damages for non-pecuniary injuries to pride and dignity. Since the rationale in that case is compensation, rather than retribution or deterrence, we concluded that such damages should be distinguished from an award of exemplary damages. The functional analysis that led to this exclusion of the compensatory function from exemplary damages is also essential for the formulation of a principled approach towards exemplary damages. Not only do the remaining rationales of retribution and deterrence lead to different conclusions with respect to the fundamental issues, such as the type of conduct addressed and the principles of quantification, they also suggest different responses to the subsidiary issues, for example, whether vicarious liability is appropriate.

2. THEORETICAL BASIS

(a) PUNITIVE RATIONALE

In this section we consider the theoretical basis of punitive damages, that is, exemplary damages awarded for the purpose of punishment.[1] The justification for punitive damages on this ground rests initially on the justification for punishment itself. While this is a complex topic in its own right, it is sufficient for present purposes to take as given the fact that in our society, as in most, it is accepted that punishment is justified whenever normative standards of absolutely proscribed behaviour are breached deliberately. Under the retributive notion, punishment is a matter of just desert. The rationale is retrospective, looking backward to the event to determine the two fundamental issues: (1) whether punishment is deserved; and, if so, (2) the measure of punishment deserved. Of course, punishment has a prospective element as well. Punishment, as a form of social control, operates to deter those who would not otherwise obey the law. Thus, while the primary purpose of punishment might be retrospective, it also affects the anticipated cost of future conduct, and thereby performs an incidental deterrence function. Nevertheless, the Commission recommends below that the determination of the question whether to award exemplary damages for the purpose of punishment, and the quantum of such damages, should be constrained by retributivist principles.[2]

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[1] The case for punitive damages in negligence, nuisance, equitable wrongs and contract is excluded. These will be discussed separately in subsequent chapters. Also discussed in a separate chapter is one of the two categories to which the English courts restrict the common law claim for exemplary damages, that is, arbitrary oppressive conduct by public authorities. In this chapter we discuss the general case for punitive damages, including the second of the two categories to which the common law claim for exemplary damages is restricted in England, that is, torts calculated to make a profit.

The argument in favour of punitive damages that follows is circumscribed by the basic retributivist constraints on the two fundamental questions. Thus, punitive damages should be awarded only if the wrongdoer has advertently committed a serious act deserving of punishment, and the size of the award should be proportionate to the gravity of the act deserving of punishment. As we shall discuss below,[3] this is quite different from the deterrence "gross up", where the award is justified and quantified with reference to the probability of enforcement rather than the character of the defendant's conduct.

Punitive damages may be viewed as a vehicle for supplementing the public criminal law, specifically as a vehicle by which the state contracts out the enforcement role to private plaintiffs. Private enforcement might be useful, as a supplement to public enforcement, as a result of such factors as budget constraints in the public sector, and incentive problems with public enforcers.[4] Thus, private enforcement through punitive damages might be a valuable vehicle with which to pursue retributive justice, provided the civil remedy is responsive to basic retributivist concerns. We determine below that this can be done with relatively few changes to the present law.[5] However, the basic case for punitive damages, in our view, can be founded on a somewhat broader footing.

First, in the view of the Commission, it would be incorrect to view punitive damages as a systematic response to the shortcomings of criminal law. The law of punitive damages is applicable to a limited range of criminal conduct only, and it is applicable only in a limited way. These limits are not always consistent with a general theory of tort as a supplement to criminal law. The law of punitive damages intrudes not on to the general criminal law, but only on to its exceptionally objectionable breaches. It is a requirement for punitive damages not only that the defendant commit a tort advertently, but that the conduct be exceptional. Moreover, punitive damages are not an inducement to the general citizenry to enforce the criminal law for profit.

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[2] For a good summary of these principles, see Ellis, "Fairness and Efficiency in the Law of Punitive Damages" (1982), 56 S. Cal. L. Rev. 1, at 4-8.

[3] *Infra*, this ch., sec. 2(b).

[4] It is unnecessary to identify in advance precisely what the public enforcement problems are, or in what types of case they typically arise. Exemplary damages cases identify themselves in this respect when they are brought.

[5] *Infra*, this ch., sec. 2(c).

The claim may be brought only by the victim of a tort, and damages may be awarded only in reference to the conduct that affected the victim.[6]

Both the general justification for punitive damages and the justification of the victim's role in the process are buttressed if the discussion is broadened to include symbolic considerations. The mere possibility of an action for punitive damages symbolizes society's commitment to retributive justice. Social values need public affirmation. The protections afforded to an accused by the criminal law and criminal procedure affirm society's belief that the innocent should never be convicted. Punitive damages, on the other hand, affirm society's belief that wrongdoers who engage in exceptional conduct should not escape their just desert. Punitive damages, especially when coupled with the media attention that they often attract, are particularly well suited to giving public affirmation to this social value. When it is brought to the attention of the public that an award of punitive damages has been made against a wrongdoer, there is a collective sense of satisfaction that justice has been done.[7] This is the symbolic dimension. This is tort as ombudsman.[8]

Moreover, it is not merely a matter of efficient enforcement that the victim secures the punitive award. The public does not perceive an injustice if the victim is a "windfall" beneficiary of a reasonable sum granted for the purpose of punishment. Rationally, one might conclude that a fully compensated tort victim has no different or greater interest than any other member of the public in seeing that the wrongdoer is punished. Intuitively, however, the opposite conclusion might be reached. This residual interest on the part of the victim might reduce solely to vengeance. If so, this would not constitute a sufficient justification for punitive damages.[9] The Commission believes, however, that a victim does have a special and direct interest, beyond mere vengeance, in seeing that justice is done in what, in a very real sense, is her case.[10]

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[6] This has certain practical advantages, for example, administrative convenience. Punitive damages permit the issue of punishment to be decided in the same trial as the issue of compensation. See Cooter, "Economic Analysis of Punitive Damages" (1982), 56 S. Cal. L. Rev. 79. The costs of a single trial are likely to be lower than separate private law actions for compensatory and punitive damages. These savings are likely to be enjoyed both by the state and the different private parties to the action.

Another advantage of allowing the tort plaintiff to be the private law enforcer of the punitive damages is that it conveniently "privatizes" the action. Without some such device of excludability, a number of different enforcers would likely be chasing the penalty. See Landes and Posner, "The Private Enforcement of Law" (1975), 4 J. Legal Stud. 1. Moreover, even if the state chooses to privatize the enforcement process quite early on, there would likely be considerable lobbying to procure the benefit. By giving the enforcement right automatically, and without discretion, to the injured plaintiff, the state effectively controls these kinds of problems.

Moreover, the plaintiff is, *prima facie*, a very effective enforcer of the law. Where a third party would actively have to seek out occurrences of the advertent denial of rights, in most cases the plaintiff has the objective fact of a rights denial visited upon her in the form of an injury. All that remains to be discovered is whether the rights transgression was advertent and therefore appropriate for punishment.

[7] It may matter little that the award is overturned on appeal (perhaps for good reason) or goes unpaid.

[8] See Linden, *Canadian Tort Law* (4th ed., 1988), at 20-25. See, also, Owen, "Civil Punishment and the Public Good" (1982), 56 S. Cal. L. Rev. 103, at 109. In the first English case to award punitive damages, *Wilkes v. Wood* (1763), 98 E.R. 489, at 499 (K.B.), the Chief Justice explained punitive damages in part as "a proof of the detestation of the jury to the action itself".

As we have indicated, one justification for some role for punitive damages in tort law is symbolic. There are limits, however, to the importance of the symbolic function. Defendants should not be punished unjustly, merely for the sake of symbolism. A new punitive damages regime, however, can be limited to exceptional conduct. Such a regime would adhere to retributive principles without sacrificing the symbolic goal. We believe the symbolic loss from abolishing punitive damages altogether would be significant.

(b) ECONOMIC DETERRENCE RATIONALE

Unlike punishment, deterrence is regarded conventionally as being within the legitimate purview of the law of torts. This makes exemplary damages for the purpose of deterrence less subject to *a priori* objection, and less vulnerable to constitutional challenge, than punitive damages for the purposes of retribution.[11] However, the conventional notion of the role of deterrence in tort law is quite different from the technical economic deterrence theory articulated by legal economists.

Under the conventional view, deterrence is an incidental function of, or perhaps a complimentary function to, the primary compensatory function of tort law. The purpose of an award of damages is to restore the plaintiff to the position she was in before the loss. The prospect of such liability, of course, has some deterrent effect. Indeed, legal economists have suggested that the compensatory measure of damages is generally the optimal award for the purpose of deterrence. However, some commentators go further and assert that deterrence is, and should be, the primary function of tort law, while compensation is merely an incidental function.[12]

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[9] This is not to suggest, however, that it ought to be ignored altogether. While a desire for revenge may not be an admirable quality, and perhaps ought to be discouraged, it might nevertheless exist. It cannot be ignored simply as being illegitimate. Otherwise sound principles that appease this desire may be desirable simply because they respond to an element of humanity. This is different from the consequentialist argument that exemplary damages deter private acts of revenge, a premise that is suspect on its own terms. Here, we are referring to a symbolic response to human emotion.

[10] It would appear that the Parliament of Canada is also beginning to accept that a victim has a special interest in the private action that supplements a public action. See *An Act to amend the Criminal Code (victims of crime)*, S.C. 1988, c. 30. See, also, Laycraft, "Assessment of Damages for Personal Injury", in Eastham and Krivy (eds.), *The Cambridge Lectures 1981* (1981) 237, at 241. A particularly good illustration of this argument is provided by a recent tort case in which a rape victim pursued and obtained an award of punitive damages from her attacker, knowing from the beginning that there was virtually no chance of realizing on the judgment. See *Myers v. Haroldson* (1989), 76 Sask. R. 27, [1989] 3 W.W.R. 604(Q.B.). See, also, English, "Rape victim's civil suit makes legal history", *The Sunday Star* (April 23, 1989), at A1, and Allard, "Sask. victim wins $40,000 punitive award from rapist", *The Lawyers Weekly* (April 28, 1989), at 2.

[11] These common objections to civil punishment are discussed *infra*, this ch., sec. 3(a) and (b).

The primary focus for economic deterrence theorists is on cases in which the probability of enforcement, that is, the likelihood of a successful civil suit in all appropriate cases, is sub-optimally low. The theory is to bring the expected cost of wrongdoing into line with the actual cost. One means by which this might be accomplished is to increase the expected sanction, by grossing up the damages.

Simply put, the problem with the low probability of enforcement is that people are less likely to be deterred the less they expect to be held liable. This is true even if they expect to have to pay full compensatory damages whenever they are held liable. The law can respond to this problem either by increasing the probability of enforcement, or by increasing the expected sanction, in an attempt to bring the expected cost of tortious conduct up to the optimum level. The award of exemplary damages, beyond the amount required for full compensation, accomplishes both. By making the defendant pay exemplary damages the sanction is increased. By allowing the plaintiff to recover those exemplary damages the probability of enforcement is increased.

The goal of deterrence is mentioned frequently in exemplary damages cases, and in the standard legal analysis of exemplary damages. Courts and commentators alike speak of deterring the defendant and like-minded others from similar conduct. Indeed, the use of the term "exemplary", as opposed to the term "punitive", suggests a deterrence, rather than a punitive, purpose. However, these references cannot be taken as evidence of judicial support for the economic deterrence gross up.[13] Rather, they are references to the deterrence function that is served incidentally, or coincidentally, with a punitive award. As we indicated in the previous section, the retributive theory of punishment is retrospective, looking backward at the event deserving of punishment, and measuring the punishment in proportion to that wrong. Inherent in such a punitive award is a prospective or deterrent effect on like-minded others. But neither the justification for, nor the measure of, an award made for punitive purposes is necessarily the same as for an award made for deterrence purposes. Nor is the proper resolution of the subsidiary issues necessarily the same in both cases.

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[12] See Posner, *Economic Analysis of Law* (3d ed., 1986), at 176-77, and 186-91.

[13] It is one thing to ameliorate concerns that punitive awards might be excessive by taking comfort in the fact that the probability of being held liable is too low. It is another thing entirely to grant exemplary damages for the specific purpose of correcting this. We are aware of no Commonwealth court that has endorsed doing so, except perhaps in the context of tort for profit.

It is not surprising that the deterrence gross up is foreign to Canadian law. The concept of corrective justice is central to the law of torts.[14] Consistent with this notion of corrective justice, punitive damages for the purposes of retribution are circumscribed, in Canada, by relating the punishment to the wrong done to the victim. In contrast, under the economic deterrence rationale, the connection between the damages gross up and the victim, the victim's loss, or the particular wrong, is one of convenience only. Both parties are merely means to a social goal independent of their relationship arising out of the tort. However justified a deterrence gross up might be in its own right, it simply does not conform to the general conception of tort law. Indeed, it actually conflicts with the conceptions of justice that are entrenched in the tort system. As such, economic deterrence theory will not likely achieve widespread acceptance in the common law of torts.

Moreover, while it would be possible, as a matter of theory, to adopt the economic deterrence rationale in preference to the retribution rationale, in our opinion, the practical problems associated with using exemplary damages to gross up the expected sanction, in order to address the problem of enforcement, are far too great to justify countenancing this rationale.

First, we turn to the low probability of enforcement problem, the justification given for the deterrence gross up. This can be expected to vary substantially, not only between different causes of action, but within causes of action, depending on a myriad of factors. Even in respect of a particular class of torts such as intentional torts, it is not possible, in our view, to assert with any degree of confidence that an enforcement problem exists, much less to estimate its magnitude. It would be unfair, therefore, to ask the court to make such determinations when exercising its discretion whether to award exemplary damages.

Second, in theory, there are few constraints[15] that would limit the expected sanction in the case of conduct that is absolutely normatively proscribed. Therefore, where the probability of enforcement is sub-optimal, on deterrence grounds alone it would be possible to ignore, within reason, concerns about exemplary damages being too high or quantification principles being too uncertain. However, such an approach would violate the basic conceptions of justice associated with tort and criminal law. These notions of justice would impose a further constraint, such that any sanction greater than that necessary to correct for the low probability of enforcement, however efficient, would be objectionable. Moreover, any attempt by a judge or jury to adjust the quantum of exemplary damages precisely to the magnitude of the enforcement problem likely would be flawed for the reasons given above.

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[14] See, generally, Weinrib, "Toward a Moral Theory of Negligence Law" (1983), 2 Law & Phil. 37.

[15] The constraints on raising the sanction would include, for example, the problem of marginal deterrence and the problem of liquidity limitations. With respect to the former, for example, the expected penalty for theft cannot be as high as the expected penalty for armed robbery, otherwise there will be incentives for wrongdoers to substitute the more serious for the less serious offence. With respect to the latter, the expected sanction cannot be raised so high as to exceed the defendant's wealth, because a penalty has no marginal deterrent effect beyond this point.

Finally, it becomes substantially more difficult to justify the fact that the exemplary damages are paid to the plaintiff where they are in the nature of a deterrence gross up. It is more likely that awards quantified in accordance with economic deterrence theory will exceed the amount necessary to induce the action than will awards quantified on retributive principles. While a victim might have a legitimate individual interest in punishing the wrongdoer, she would have no special interest in deterring others. Thus, the possibility of a large windfall benefit becomes a matter of greater concern under an economic deterrence regime.

(c) CONCLUSIONS

While a valid argument might be constructed on deterrence grounds that would justify an award of exemplary damages to take into account a low probability of enforcement, this justification does not conform to the general notion of corrective justice inherent in the law of torts. Moreover, without empirical study we do not know which torts, or which variations within a tort, present this problem, or to what extent. Neither general legislation on exemplary damages, nor judicial discretion, can be expected to overcome these difficulties. A deterrence gross up might be a useful tool in particular regulatory or even criminal contexts where detailed study reveals the existence and magnitude of the enforcement problem.[16] However, the law of tort, as it is currently conceived, can make only a modest contribution to deterrence in excess of compensatory damages.[17]

The present law of exemplary damages reflects a number of different rationales. For the most part, however, it is consistent with retributive theory and is inconsistent with economic deterrence theory. In Canada, an exemplary award is both allowed and quantified with reference to the particular injury done to the plaintiff. The purpose of a deterrence gross up, on the other hand, is to deter the defendant and others in the future. The quantum of an award made for such purposes would be determined with reference to the enforcement problem, not with reference to the defendant's past conduct. The fact that exemplary damages are given only where the defendant's conduct is exceptional is consistent only with a punitive rationale, even though there might be incidental deterrence implications. The low probability of enforcement problem is not related necessarily to exceptional conduct. Economic deterrence theory, unlike retributive theory, does not support isolating exceptional conduct for special treatment. In our view, exemplary damages in the law of torts are not an effective vehicle with which to pursue sophisticated deterrence goals, however desirable effective deterrence might be.

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[16] Such a proposal for dealing with corporate crime is under consideration in the United States. See "Plan for punishing crimes by companies fuels heated debate", *Globe & Mail* (Oct. 11, 1988), at A3. Interestingly, those who oppose the proposal object that it is too lenient. Moreover, the *Environmental Protection Act*, R.S.O. 1980, c. 141 s. 146c, en. by S.O. 1986, c. 68, s. 15, authorizes a fine equal to the convicted party's benefit in addition to any other penalty. See, also, Vaver, "Infringing Copyright in a Competitor's Advertising: 'At Large' Damages Can Be Large Damages" (1985), 1 Int. Prop. J. 186, at 190-93, and Schwartz, "Deterrence and Punishment in the Common Law of Punitive Damages: A Comment" (1982), 56 S. Cal. L. Rev. 133, at 139.

[17] It should be noted that an award of punitive damages would affect both the probability of enforcement and the expected sanction, even though this is not the primary purpose.

The present law has developed without distinguishing initially between aggravated and exemplary or punitive damages, and without distinguishing between the case for punishment, and the case for deterrence. Nevertheless, we have concluded that the present rules regarding exemplary damages are, subject to a number of amendments, discussed below, sound and satisfactory principles to govern exemplary damages for the purpose of punishment in Ontario.

The Commission therefore recommends that exemplary damages for the purpose of punishment should continue to be available in Ontario, and should be referred to as "punitive damages". We adopt the term "punitive damages", in preference to the term "exemplary damages", to emphasize the punitive rationale. The Commission further recommends, as we indicated above, that the determination of the question whether to award punitive damages, and the quantum of such damages, should be constrained by retributivist principles. Accordingly, we recommend that punitive damages should be awarded only where the defendant has advertently committed a wrongful act deserving of punishment, and where the defendant's conduct was exceptional.[18] The threshold prerequisite of advertent wrongful conduct, in our view, should comprehend the case where the defendant knew or ought to have known that the act was wrong, and we so recommend. In addition to advertently wrongful conduct, however, the defendant's conduct must be "exceptional". Exceptional conduct should include conduct that is described under the present law as being, among other things, malicious, high-handed, outrageous, or cynical.[19] However, we further recommend that exceptional conduct should include conduct engaged in for the purpose of making a profit.[20] In our view, where a defendant has advertently committed a wrongful act for the purpose of making a profit, she has identified herself as an egregious wrongdoer. Including such conduct within the meaning of "exceptional conduct" will clarify the present law, and will ensure that punitive damages will continue to be available in these circumstances without requiring proof that the defendant's conduct was otherwise exceptional.

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[18] We recommend below that the size of the award should be proportionate to the gravity of the act deserving of punishment. The principles of quantification are discussed *infra*, this ch., sec. 3(d).

[19] For a further discussion of "exceptional conduct" under the present law, see *supra*, ch. 2, sec. 3.

[20] At present, the precise status of the tort for profit category in Canada is unclear. While exemplary damages are not restricted in Canada to the two categories set out by Lord Devlin in *Rookes v. Barnard*, [1964] A.C. 1129, [1964] 2 W.L.R. 269 (H.L.) (subsequent

Corporations pose additional difficulties in the present context. It might be argued that it is not rational to punish a corporation, since the punishment will fall ultimately on the innocent shareholders. On the other hand, it is unacceptable to immunize corporations from the consequences of their managerial actions. The Commission has concluded that corporations should be treated the same as natural persons. Indeed, we recommend that the entire regime for punitive damages proposed in this report should apply equally to corporations and individuals.

3. A RESPONSE TO THE COMMON OBJECTIONS TO CIVIL PUNISHMENT

It is clear that punishment is a legitimate and necessary function in a developed legal system, and that damages for the purpose of punishment have a sound pedigree in the law of torts,[21] particularly in Canada where the restrictions of *Rookes v. Barnard*[22] have been rejected. The adoption of the punitive rationale has implications for the resolution of a variety of issues that arise in the context of a new punitive damages regime. In resolving these issues, the Commission makes a number of recommendations that respond to the objections ordinarily made to civil punishment.[23]

(a) *A Priori* Objections to Civil Punishment

We believe there is no merit to the argument that punishment is, or should be, precluded *a priori* from the law of torts. While it might be useful, in certain circumstances, to refer to the function of criminal law as being punishment, and the function of tort law as being compensation, to suggest

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references are to [1964] A.C.), the courts frequently refer to the fact that the case falls within the tort for profit category. What is uncertain is whether the tort for profit category has been absorbed into the advertent exceptional conduct test usually employed, or whether it exists as a distinct basis for exemplary damages. See, for example, *Townsview Properties Ltd. v. Sun Construction and Equipment Co. Ltd.* (1973), 2 O.R. (2d) 213, 42 D.L.R. (3d) 353 (H.C.J.), varied (1974), 7 O.R. (2d) 666, 56 D.L.R. (3d) 330 (C.A.), where the "tort for profit" rationale was relied upon to award exemplary damages in the absence of the moral turpitude normally required.

[21] The earliest case is said to have been *Wilkes v. Wood, supra*, note 8. However, the admonitory function of the law of torts probably antedates the compensatory. See Henderson, "Punitive Damages in the Modern Civil Justice System: An Anomaly in Need of Change?", on file at the National Headquarters of the American College of Trial Lawyers, 4.

[22] *Supra*, note 20.

[23] The arguments ordinarily advanced for and against the award of punitive damages are discussed *supra*, ch. 3.

that these are other than broad generalizations would be simplistic, if not incorrect, in both cases. It would be even more misguided, in our view, to conceive of the historical divergence between criminal law and tort law as the product of rational social planning, where the branches were divided according to functions delegated exclusively to one or the other. The long history of punitive damages in tort denies any such claim. Indeed, it has been suggested that "[e]ven after the law . . . diverged, the damages that were assessed in general under tort law served more of an admonitory function than a reparative function".[24] Whatever other objections might be made to punitive damages in tort, they are not buttressed by *a priori* arguments.

(b) CONSTITUTIONAL OBJECTIONS

In Canada, two separate constitutional arguments might be advanced against punitive damages. The first argument is based on the fact that section 91(27) of the *Constitution Act, 1867* assigns to the Parliament of Canada exclusive jurisdiction in relation to the criminal law. The second argument is based on section 9(a) of the *Criminal Code*, which provides that "no person shall be convicted . . . of an offence at common law".[25]

For the reasons given in the preceding section, the Commission is of the view that it cannot be argued *a priori* that damages given for the express purpose of punishment are therefore in the criminal realm, or that punishing a tortfeasor thereby transforms a tort into a common law crime. Moreover, the power to punish in relation to a valid provincial head of power by fine, indeed by incarceration, is expressly given to the provinces by section 92(15) of the *Constitution Act, 1867*. The Supreme Court of Canada has recognized the power of the provinces to add provincial penalties to criminal penalties,[26] to prevent crime by imposing penalties,[27] and to deal with criminal behaviour under otherwise valid provincial regulation.[28] Until recently, provided the provincial legislation had some connection to a valid provincial head of power and was not a patently colourable attempt to criminalize conduct *per se*, the courts were not likely to declare the legislation unconstitutional. Prior to the decision of the Supreme Court of Canada in *Westendorp v. The Queen*,[29] it was relatively certain that punitive damages would survive a constitutional challenge. Some support for this may be taken from the apparent absence of any such constitutional challenge to date.

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[24] Henderson, *supra*, note 21, at 4. For a rejection of the *a priori* argument see *Cassell & Co. Ltd. v. Broome*, [1972] A.C. 1027, at 1114, [1972] 2 W.L.R. 645, at 709 (subsequent references are to [1972] A.C.), *per* Lord Wilberforce. *Contra*, see *ibid.*, at 1086, *per* Lord Reid.

[25] R.S.C. 1985, c. C-46, as en. by R.S.C. 1985, c. 27 (1st Supp.), s. 6.

[26] *Provincial Secretary of Prince Edward Island v. Egan*, [1941] S.C.R. 396, [1941] 3 D.L.R. 305.

[27] *Bedard v. Dawson*, [1923] S.C.R. 681, [1923] 3 W.W.R. 412.

[28] *Nova Scotia Board of Censors v. McNeil*, [1978] 2 S.C.R. 662, 25 N.S.R. (2d) 128.

[29] [1983] 1 S.C.R. 43, [1983] 2 W.W.R. 385 (subsequent reference is to [1983] 1 S.C.R.).

The decision in *Westendorp v. The Queen* suggests a greater concern with provincial legislation aimed directly at criminal conduct, and a correspondingly greater willingness to scrutinize the connection to valid provincial objectives. In that case, a municipal by-law prohibiting a person from remaining on a street for the purpose of prostitution, and from approaching another on a street for that purpose, was held to be *ultra vires*. Laskin C.J.C. held that the purpose of the by-law was "so patently an attempt to control or punish prostitution as to be beyond question".[30] This case would appear to suggest that where "the provincial offence cannot be safely anchored in property and civil rights or some other head of provincial power, then it will be invalid".[31] Whether this decision will eventually be regarded as an aberration, turning on the particular issue, remains to be seen.[32] The Supreme Court of Canada's subsequent attempt to reconcile the cases in this area in *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*,[33] adopts guidelines that might prove problematic for punitive damages.

The majority judgment in *Rio Hotel Ltd. v. New Brunswick (Liquor Licensing Board)*, was given by Dickson C.J.C. It was held that, in order to survive a constitutional challenge, the provincial legislation must be valid independently by association with a legitimate head of provincial jurisdiction. Punitive damages probably enjoy the necessary link to the property and civil rights jurisdiction of the province to satisfy this requirement. However, Dickson C.J.C. seemed to suggest further that either the absence of an overlap with federal criminal conduct, or the absence of a penalty, is necessary to protect the otherwise valid provincial legislation. Punitive damages are clearly a penalty. Arguably, the fact that, in many cases, precisely the same conduct that gives rise to a cause of action in tort, also constitutes an offence under the *Criminal Code*, might violate the alternative requirement. However, there are significant differences. For example, the context is private tort litigation, with all the differences that entails, not public criminal prosecution. Moreover, there is the added requirement of "exceptional conduct" to differentiate an award of punitive damages from a criminal offence.

The minority judgment in the same case may be even more problematic. Speaking of the otherwise valid purposes of the licensing scheme in question, Estey J. said that the legislation must "confine the offences created . . . to those which are reasonably necessary for that purpose. The longer the penalty and the closer the terminology comes to describing conduct traditionally criminal, the more doubtful the validity of the provincial enactment."[34] The facts of *Rio Hotel Ltd.* are too different from the issue of punitive damages to make parsing the phrases from either judgment productive.[35] However, the substance of Mr. Justice Estey's judgment is problematic for punitive damages.

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[30] *Ibid.*, at 52.

[31] Hogg, *Constitutional Law of Canada* (2d ed., 1985), at 420.

[32] See *ibid.*, at 419.

[33] [1987] 2 S.C.R. 59, 77 N.R. 104 (subsequent reference is to [1987] 2 S.C.R.).

In support of punitive damages in provincial legislation, it might be argued that the main function of such damages is to supplement tort law where, as we concluded earlier, there is no *a priori* objection to punishment. However, in our view, the principle argument in favour of punitive damages is that they supplement the criminal law by responding to the enforcement shortcomings of the criminal law system.[36] As we discussed above, the function of such damages as a deterrent to tortious conduct is merely incidental to, and is circumscribed by, the punitive function.[37] This analysis might render punitive damages vulnerable to constitutional challenge for want of the connection between punitive damages and the valid provincial purpose required by the judgment of Estey J., if not that required by the judgment of Dickson C.J.C. It is ironic that the clear separation of the functions performed by exemplary damages, so necessary to rationalize this area of the law, also renders the classic punitive function more vulnerable to a challenge on constitutional grounds.

Nevertheless, the Commission is optimistic that the historical pedigree of punitive damages, its private tort law context, and its common law character, even if amended by statute, would enable it to survive a constitutional attack. Moreover, as we noted earlier, the likelihood that punitive damages would survive is buttressed by the fact that no such challenge appears to have been made to date.

The issue of whether common law principles might be objectionable on constitutional grounds is different, perhaps, from the constitutional issue regarding provincial legislation. The *Constitution Act, 1867* deals primarily with the separation of legislative powers between the federal government and the provinces, not between the legislatures and the courts, particularly section 96 courts. A challenge on the basis of section 9(a) of the *Criminal Code*,[38] however, would apply to the courts, and one would expect that the substantive arguments that would be raised in such a case would be similar to those that would be raised in a constitutional challenge to provincial legislation. As we indicated above, however, in the view of the Commission, the punishment of a tortfeasor by means of an award of punitive damages would not transform the tort into a common law crime.

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[34] *Ibid.*, at 80.

[35] For example, that the penalty is damages, or that the terminology is legitimately within the realm of the law of torts, distinguishes some of the specific phrases in Mr. Justice Estey's judgment, but the merits of the argument should not depend on this.

[36] It would be unfortunate if the constitutional objection restricted punitive damages to torts dealing with conduct not thought sufficiently objectionable to warrant inclusion in the *Criminal Code*, *supra*, note 25.

[37] See *supra*, this ch., sec. 2(a).

[38] See *supra*, text accompanying note 25.

(c) OVERLAP WITH THE CRIMINAL LAW

The elements of many torts, and perhaps of most torts in which punitive damages have traditionally been awarded, are substantially similar to the elements of offences under the *Criminal Code*.[39] Thus, in determining whether to award punitive damages, a court might be confronted with the fact that (1) the defendant could have been punished by a criminal court; (2) the defendant has already been punished by a criminal court; (3) the defendant may yet be punished by a criminal court; or (4) the defendant has been acquitted by a criminal court.

Generally, a criminal disposition will antedate a civil judgment. If the defendant has been acquitted in criminal proceedings, under present law this would not operate as a bar to punitive damages in tort.[40] Implicit in this line of authority are two fundamental conclusions: (1) that the differences between the tort and criminal action are sufficient to justify proceedings in both; and (2) no issue of double punishment arises as a concern for the civil court. In the view of the Commission, these conclusions are sound, and are not problematic.

The case of a prior conviction differs from an acquittal because the criminal court will have addressed the question of punishment. It may have imprisoned or fined the defendant, or both, or it may have granted the defendant a discharge. Canadian courts have universally declined to award punitive damages where the defendant has been imprisoned.[41] Courts have differed in the case of a prior discharge, but in some instances have awarded punitive damages against a previously discharged criminal defendant.[42]

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[39] *Supra*, note 25.

[40] See Waddams, *The Law of Damages* (1983), para. 1023, at 591-92. However, a challenge under s. 11(h) of the *Canadian Charter of Rights and Freedoms*, being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102, effective June 21, 1984, remains possible. See the discussion of double jeopardy *infra*, this sec.

[41] See Waddams, *supra*, note 40, para. 1023, at 591, and Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at 699. See, also, *Papadatos v. Sutherland* (1987), 7 Q.A.C. 165, 40 D.L.R. (4th) 755 (C.A.) where the court declined to award punitive damages under the Quebec Charter, but differed as to whether prior criminal punishment was an absolute bar, or merely a factor to be taken into account. An additional issue with assault and battery is discussed by Elman and Klar, "Annotation" (1977), 3 C.C.L.T. 145.

[42] See Waddams, *supra*, note 40, para. 1023, at 591, and Cooper-Stephenson and Saunders, *supra*, note 41, at 699. See, also, Hawley, "Punitive and Aggravated Damages in Canada" (1980), 18 Alta. L. Rev. 485, at 504.

There is no authority on the issue of adding punitive damages to a previous criminal fine.

The issue for determination by the Commission is whether the civil court ought to accept a criminal disposition as conclusive, thus making a prior criminal conviction an absolute bar to an award of punitive damages, or whether the civil court ought merely to take the prior criminal disposition into account, as it now invariably does, in determining whether and to what extent punitive damages should be awarded. In this context, there is no logical reason to distinguish between imprisonment, fine, and discharge. All three options represent the criminal court's determination as to what, if any, punishment is warranted.[43] As a practical matter, it seems highly unlikely that a civil court would see punishment beyond imprisonment as warranted, whereas it might well regard a fine as insufficient, and a discharge as no punishment at all, on the facts as proven in the civil court. However, if the criminal disposition is to be conclusive of the issue, it should be conclusive in all three cases.

There are three arguments that might be advanced to suggest that a criminal conviction should be regarded as an absolute bar to punitive damages. First, is the prohibition against double jeopardy, which applies to an acquittal as well as to a conviction. Common law punitive damages have not been tested in the courts on this ground.[44] Should the courts reject the technical argument of double jeopardy, two further arguments remain. The second argument that a criminal conviction should be regarded as an absolute bar to punitive damages is that the case for punishing the defendant for substantially the same conduct will be heard twice, and punishment might be imposed twice. When a civil court awards punitive damages in a case in which a defendant was convicted earlier, there is at least the appearance that the second judge is overruling the first. This may damage the stature of the criminal system somewhat in the public eye. Finally, if one adopts as the rationale for punitive damages the fact that they constitute an appropriate vehicle by which the state contracts out the enforcement process to compensate for an inadequate number of public enforcement actions, where the state has in fact taken enforcement action itself, the case for private enforcement action, on retributive grounds, is negated.

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[43] Under s. 736 of the *Criminal Code*, *supra*, note 25, as am. by R.S.C. 1985, c. 27 (1st Supp.), s. 162, a conditional or absolute discharge may be granted, instead of a conviction, in certain circumstances. It is not, however, an acquittal, and it may be treated as a conviction in some contexts. Factually, a discharge reflects a judicial determination that the circumstances listed in the Code do not warrant the stigma of a criminal record. This, in essence, is a determination as to the appropriate measure of punishment.

[44] See s. 11(h) of the *Canadian Charter of Rights and Freedoms*, *supra*, note 40. The leading authority on the general issue is *R. v. Wigglesworth*, [1987] 2 S.C.R. 541, 45 D.L.R. (4th) 235. In that case, the Court distinguished between public prosecution by the state, and private matters within a limited private sphere. In *R. v. Ferreira*, [1988] 1 C.T.C. 225 (Ont. Dist. Ct.), rev'd unreported (October 17, 1988, Ont. C.A.), counsel attempted to overcome the s. 11(h) challenge by arguing that a penalty under the *Income Tax Act* was similar to punitive damages. The court, in rejecting this argument, noted that the indivisible Crown had prosecuted both actions. In *Wigglesworth*, the fact that the penalty did not go to the consolidated revenue fund was significant. In *Re Gillen and College of Physicians & Surgeons of Ontario* (1989), 68 O.R. (2d) 278 (Div. Ct.), an application for prohibition against a disciplinary body, hearing a complaint about sexual assault for which the applicant had been acquitted in criminal court, was refused. The court stressed the different standard of proof, the different rules of evidence, and the fact that the evidence might differ. See, also, *R. v. Zelensky*, [1978] 2 S.C.R. 940, 86 D.L.R. (3d) 179, which may suggest that the civil court should defer to the criminal court if it is aware of related criminal proceedings. Query whether the *Charter* challenge could succeed against the private action, however, or only against an action brought by the state.

On the other hand, there are many reasons why the evidence in a civil case may present an entirely different picture to the court than the evidence presented to the criminal court. The victim, virtually disenfranchised in the criminal system, controls the civil action. There are interests and constraints that operate on the Crown that differ substantially from those faced by a civil plaintiff. Thus, the legal facts presented in both actions may be sufficiently different to counter both the double jeopardy concern, and the *de facto* overruling concern.

In the view of the Commission, there are two compelling reasons that a second set of legal facts should be allowed to emerge from a single factual incident, both of which suggest that there is more to the case for punitive damages than that they simply provide a method of dealing with an inadequate number of public enforcement actions. First, tort law can supplement the criminal law by compensating for certain limitations inherent in the criminal justice system that might otherwise result in some individuals who engage in criminal behaviour receiving less than their just desert.[45] In such a case, the public interest in justice is better served, with no injustice to the defendant, provided, of course, the criteria for punishment and quantification are principled. Second, while it is beyond dispute that criminal conduct is a public matter, one of the disadvantages of public enforcement is the fact that the actual victims of crime are disenfranchised. The symbolic benefits of preserving the victim's right to commence a civil action for punitive damages, and the symbolic benefits of the occasional successful action, should not be ignored. Indeed, the strength of the private and symbolic arguments may determine the outcome of a constitutional challenge. The Commission has concluded, therefore, that the fact that there have been criminal or other similar proceedings against the defendant should not operate as a bar to an award of punitive damages. The Commission has further concluded that, in determining the extent, if any, to which punitive damages should be awarded, the court should be entitled to consider the fact and adequacy of any prior penalty imposed in any criminal or other similar proceeding brought against the defendant.

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[45] One might argue instead that the criminal system ought to be improved. However, it may be desirable to supplement the criminal system without changing it. In the criminal law, it is accepted that spurious convictions are to be avoided at the expense of spurious acquittals. Some guilty parties go free in order to insure that fewer innocent parties are convicted. It may be desirable, therefore, to have a second tier of punishment, directed solely at the exceptional wrongdoer, where the consequences of spurious convictions are less severe.

Finally, there may be cases where the defendant has not been charged or prosecuted and the limitation period for criminal proceedings has expired. As in the case of an acquittal, this should have no bearing on the question of punitive damages. More commonly, where the defendant has not been charged or prosecuted, it will remain theoretically possible, if unlikely, that criminal proceedings will be brought after a judgment for punitive damages. Although we are unaware of any case in which this has occurred, it is likely that the criminal court would take the civil penalty into account. The possibility that such a case would arise, and that the criminal court would ignore the previous punitive award, leading to double punishment, is too remote to be of concern. Moreover, it should be kept in mind that successful punitive damages claims are rare, and appear to be declining in the traditional areas most likely to overlap with the criminal law.[46]

The Commission therefore recommends as follows:

(1) The fact that there have been or might be criminal or other similar proceedings against the defendant should not operate as a bar to an award of punitive damages.

(2) In determining the extent, if any, to which punitive damages should be awarded, the court should be entitled to consider the fact and adequacy of any prior penalty imposed in any criminal or other similar proceeding brought against the defendant.

(3) The fact that the defendant has not been charged or prosecuted and the limitation period for criminal or other proceedings has expired should not operate as a bar to a claim for punitive damages.

(d) QUANTIFICATION OF PUNITIVE DAMAGES

(i) Principles of Quantification

Of all the objections to punitive damages in tort, concerns about the absence of clear principles to govern the size of the award are among the most basic. Lord Devlin urged that awards be moderate, and expressed concern that admonitions to juries to be moderate might not effect sufficient control.[47] Perhaps a better principle is that the quantum of the award should reflect the amount necessary to achieve the purpose of the award.[48] However, this is complicated, at present, by the fact that the law has not always distinguished amongst the purposes of compensation, deterrence, and punishment sought to be achieved by an award of exemplary damages. It is a much more useful principle in a regime that isolates punishment as the rationale for an award.

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[46] See *supra*, ch. 4.

[47] *Rookes v. Barnard*, *supra*, note 20, at 1228.

[48] *Fleming v. Spracklin* (1921), 50 O.L.R. 289, at 297-98, 64 D.L.R. 382 at 389-90 (App. Div.).

If, as we propose, the purpose of an award of punitive damages should be to punish the wrongdoer, it follows, as we recommended above, that the award should be quantified on sound retributive principles. The focus of such an award, therefore, should be retrospective, looking back at the specific conduct that triggered the award, and the quantum of punishment should be proportional to that wrong.[49] Accordingly, we recommend that the size of an award of punitive damages should be proportionate to the gravity of the act deserving of punishment. General concerns, in our view, about sending a message to others, let alone a sophisticated deterrence gross up, are inappropriate considerations in the quantification of an award of punitive damages. However, as we shall discuss in the following section, the wealth of the defendant might be a relevant consideration in certain circumstances.

The above approach might raise a concern with respect to the "prior knowledge" condition for retributive punishment. According to this requirement, the defendant must have a reasonable idea of the punishment that will be imposed. The *Criminal Code*,[50] for example, is explicit by providing maximum statutory penalties. These cannot be incorporated by reference into the tort regime. Not only is there not a criminal offence that corresponds with every tort, but the maximum penalty specified in the *Criminal Code* is frequently a term of imprisonment. In the view of the Commission, however, the principle of proportionality articulated above meets this condition. It is certainly more focused than a mere admonition to be moderate or reasonable.[51]

It is the practical concern with enormous awards that has so influenced the debate in the United States.[52] Such awards have not manifested themselves in Canada.[53] Moreover, there are a number of reasons to believe that awards of extraordinary size will be controlled, and therefore will not become a problem here in the future.

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[49] Where courts have accepted punishment as the goal, they have so articulated the principle. See, for example, *Ross v. Lamport*, [1956] S.C.R. 366, at 376, 2 D.L.R. (2d) 225, at 233, and *Manson v. Associated Newspapers, Ltd.*, [1965] 1 W.L.R. 1038, at 1046, [1965] 2 All E.R. 954, at 960 (Q.B.).

[50] *Supra*, note 25.

[51] See *Cassell & Co. Ltd. v. Broome*, *supra*, note 24, at 1087, *per* Lord Reid.

[52] See *supra*, ch. 2, secs. 4 and 5.

[53] See *ibid.* Unadjusted for inflation, the two largest awards in Canada were for $50,000, as reported in Cherniak and Morse, "Aggravated, Punitive and Exemplary Damages in Canada", in *Special Lectures of the Law Society of Upper Canada 1983[:] Torts in the 80s* (1983) 151, at 216. No higher awards were disclosed in the empirical study conducted in conjunction with this report, summarized *supra*, ch. 4. Accepting the plea for moderation, the House of Lords nevertheless awarded £25,000 in *Cassell & Co. Ltd. v. Broome*, *supra*, note 24. It is not clear in these cases what proportion of this amount was intended for the sole purpose of punishment. The largest Canadian award was $4,800,000 in *Claiborne Industries Ltd. v. National Bank of Canada* (1989), 69 O.R. (2d) 65, 59 D.L.R. (4th) 533 (C.A.). However, this was quantified on the principle that the defendant should not profit from the wrong. This case is discussed *infra*, ch. 7.

First, the proportionality principle articulated above can be distinguished clearly from the economic deterrence principle. At least some of the large awards made in the United States were given for the purpose of deterrence.[54] Second, the Commission recommends that the present requirement that the punishment be quantified with reference only to the tort committed against the plaintiff should be retained. The award should be made to punish the defendant for the act that caused the plaintiff's injury, and it should be proportionate to that wrong alone. The fact that the defendant exposed others to the same risk, perhaps systematically, may also justify an exceptional remedy, but that is a separate question deserving of separate analysis.[55] Again, it would appear that many of the larger awards made in the United States were given for the purpose of punishing the defendant for a general course of conduct, not for a specific wrong done to the plaintiff.[56]

The Commission considered a number of devices that would further limit the size of future awards of punitive damages. For example, one alternative, adopted or under consideration in a number of jurisdictions in the United States, is to impose a statutory cap on the award.[57] One approach to such a cap is to limit punitive damages to a fixed proportion of the compensatory award. While this approach is certain, it subverts retributive justice. The proper measure of retributive punishment bears absolutely no relationship to compensatory damages, let alone to any arbitrary proportion of such damages. Moreover, this approach renders punitive damages unavailable in cases in which some believe they are needed most, that is, where the conduct is egregious, but the provable loss is too small to warrant the financial expenditures associated with a tort action.

A second approach would be to impose a fixed monetary cap. In this case, it would be necessary to prioritize particular torts on the basis of how they merited punishment, to consider particularly exceptional modes of committing the most serious torts, and to consider relevant characteristics of particular defendants. Assuming this could be done, the cap would meet the goals of retributive justice in the worst possible case, but offer little guidance in other cases. Alternatively, the cap could be set to ensure a fair inducement to litigate the issue, but to limit excessive recovery by plaintiffs even at the risk of allowing some deserving of punishment to go free.[58] Again, a fair cap for complex litigation would offer little guidance for the other cases. It seems likely that any such cap would be considerably higher than the modest awards now granted, and it might have the effect of inflating, rather than controlling, punitive awards in Ontario. The Commission has concluded, therefore, that the imposition of statutory caps, either by means of a fixed proportion of the compensatory award, or as a fixed monetary sum, should be rejected.

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[54] Reforms in the United States seem directed towards asserting the retributive basis in preference to the deterrence basis.

[55] See *infra*, ch. 8, sec. 2.

[56] See Priest, "Punitive Damages and Enterprise Liability" (1982), 56 S. Cal. L. Rev. 123. The author hypothesizes that the increase in punitive damages in the United States is related to the entrenchment of the enterprise liability theory, which provides "that corporate enterprise ought to be responsible for injuries caused by products that it places in commerce or for losses suffered from the pursuit of its commercial interests": *ibid*, at 124.

[57] Various caps have been adopted in a number of states. See American College of Trial Lawyers, Committee on Special Problems in the Administration of Justice, *Report on Punitive Damages* (1989), at 5. The College (at 15) recommended a cap of twice the compensatory award, or $250,000, whichever is greater. In part, this endorses the false relationship between compensatory damages and retributive punishment. A fixed limit of $250,000 would be meaningless or inflationary in Ontario where the largest award to date has been $50,000. It is questionable whether the $4,800,000 award in *Claiborne Industries Ltd. v. National Bank of Canada*, *supra*, note 53, had it removed the defendant's actual profit as intended, ought to be classified as punitive for this purpose. Moreover, it would not be affected by any cap that relates the size of the punitive award to the size of the compensatory award. See, also, *supra*, ch. 2, sec. 4.

The Commission also considered whether the power to quantify the award should be removed from the jury and given to the judge, once the jury had concluded that the case called for punitive damages. Such a measure would bring civil punishment into line with the criminal justice system, where the appropriate sentence is determined by the judge. However, there is no indication that arbitrary or excessive jury awards have been made in Ontario, such as those alleged to have been made in the United States. Moreover, as the jury assesses compensatory damages, it would be inconsistent to remove the power from the jury to assess punitive damages. Further, leaving the quantification of punitive damages with the jury will provide a community standard of the appropriate measure of such damages. This is not to suggest, however, that the right of the jury to assess punitive damages should be unlimited. A similar issue was considered by the Commission in our 1987 *Report on Compensation for Personal Injuries and Death*,[59] in which the Commission made the following recommendations:[60]

(1) In the trial of an action for damages for personal injuries, the judge should be empowered to give guidance to the jury concerning the quantum of damages for non-pecuniary loss.

(2) Counsel should have the right to make submissions to the judge or the jury, as the case may be, on the quantum of damages, subject to the trial judge's overriding discretion to control proceedings of the court.

(3) An appellate court should have the power, when setting aside a jury or court assessment of damages for non-pecuniary loss, to

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[58] See Owen, *supra*, note 8, at 119, suggesting the greater of double the compensatory award or the costs of litigation plus $10,000. See, also, *supra*, note 57.

[59] Ontario Law Reform Commission, *Report on Compensation for Personal Injuries and Death* (1987) (hereinafter referred to as "Report on Compensation").

[60] *Ibid.*, at 109.

> substitute its own assessment, instead of ordering a new trial, if it thinks this to be just in the circumstances.

In the present context, the Commission has concluded, and therefore recommends, that the power to quantify an award of punitive damages should remain with the jury, and that the above recommendations with respect to jury awards in actions for damages for personal injuries, made in our Report on Compensation, should be extended to apply to punitive damages.

(ii) Relevance of the Defendant's Wealth

The present law in England and Canada is that the defendant's wealth is relevant to determining the size of the punitive award.[61] This, in our view, is sound in principle. While a wrong does not vary in character according to the wealth of the defendant, the size of the penalty necessary to manifest the objective significance of the wrong must do so.[62] "[T]here is no greater inequality than the equal treatment of unequals."[63]

Certain practical difficulties arise where the courts attempt to take wealth into account in a precise or systematic fashion. For example, a determination of the objective significance of a monetary fine or payment of damages for different defendants would require that the courts make highly problematic interpersonal comparisons of the utility of money.[64] Moreover, there are particular problems with attempts to have penalties reflect corporate wealth.[65] It is meaningless to speak of retribution against a corporation, and problematic to consider retribution against the shareholders. As illustrated in *Browning-Ferris Industries Inc. v. Kelco Disposal Inc.*, punishing corporations in arithmetic proportion to their wealth produces some apparent distortions.[66]

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[61] *Rookes v. Barnard*, *supra*, note 20, at 1228. See, also, Waddams, *supra*, note 40, para. 1007, at 580, and Cooper-Stephenson and Saunders, *supra*, note 41, at 702-03.

[62] Of course, this observation is restricted to financial penalties.

[63] Frankfurter J. in *Dennis v. United States*, 339 U.S. 162 (1950), at 184, quoted with approval by McIntyre J. in *Andrews v. Law Society of British Columbia*, [1989] 1 S.C.R. 143, at 164, [1989] 2 W.W.R. 289, at 299.

[64] See Abraham and Jeffries, "Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth" (1989), 18 J. Legal Stud. 415.

[65] *Ibid.*

[66] (1989), 57 Law Week 4985 (S.C.U.S.). See the *amicus curiae* brief on behalf of Novistar International Transportation Corp. The court rejected the argument that punitive damages violated the Excessive Fines Clause of the Eighth Amendment, and did not disturb a $6,000,000 jury award of punitive damages.

In the example given in the brief, two companies, one 10 times larger than the other, issue the same tortious directive to employees. The larger company then applies the directive to the detriment of 50 people, the smaller to 5 people. If each is fined 1% of its

In addition, a number of difficulties might arise as a result of the disclosure of information respecting the defendant's financial position:[67]

> The first possible effect concerning the discovery of a defendant's wealth is where disclosure upon a mere allegation of conduct giving rise to a recovery of punitive damages would be detrimental. The second possible effect is the unnecessary intrusion by the plaintiff into the defendant's personal financial affairs when no basis for punitive damages has been established. Third, plaintiffs may use a request for defendants to produce information for the purpose of coercing the defendant to settle an unmeritorious claim. Finally, the expense and inconvenience associated with such a request may cause hardship on the defendant.

In responding to suggestions that discovery into the defendant's financial affairs should be limited, the courts in the United States have adopted four different approaches: (1) allow unrestricted discovery nevertheless; (2) leave the decision respecting discovery within the discretion of the trial judge; (3) require the plaintiff to provide sufficient evidence to support a claim for punitive damages before permitting discovery into the defendant's financial position; and (4) bifurcated trials, requiring liability to be determined before discovery is permitted into the defendant's wealth.[68] In the latter case, evidence concerning the defendant's wealth would be given to the court at the penalty stage only.

In Canadian practice, it appears that wealth is assessed without detailed evidence; "the defendant's wealth typically goes unspecified, forcing the courts to speculate on the matter, for example by assessing the parties in the witness-box".[69] While it would appear that awards vary according to the defendant's wealth, they do not appear to do so in any scientific fashion. Counsel who responded to our inquiries indicated that, in their opinion, judges control investigation into the defendant's wealth carefully, both on

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wealth each time, the brief states that the larger company will lose 50% of its wealth, while the smaller company will lose only 5%. Implicit in the brief is the assumption that the 2 companies are equally deserving of punishment for the single directive, which ignores the fact that the larger company has injured 10 times as many people. The numerical result in the example is also wrong. The 1% award would be assessed against a declining wealth base with each award, not a fixed base as assumed in the example. Using the method in the brief, two awards of 50% of a defendant's wealth would exhaust its wealth, whereas in fact the second award would be 50% of the 50% remaining after the first award, or 25%. In the example in the brief, the large company would end up paying 39.5% of its original wealth, while the smaller would pay 4.9%. Thus, the larger company is actually punished less in proportion to the number of tortious acts. Consider also that the defendants may have benefited from the wrong in similar proportions. Finally, the example assumes wrongly that equal treatment requires that damages be in equal proportion to the defendants' wealth.

[67] Schlueter and Redden, *Punitive Damages* (2d ed., 1989), Vol. 1, § 5.3(F)(2), at 203.

[68] *Ibid.*, at 203-04.

[69] Cooper-Stephenson and Saunders, *supra*, note 41, at 703. See, also, *Johnston Terminals & Storage Ltd. v. Miscellaneous Workers, Wholesale & Retail Delivery Drivers & Helpers Local Union No. 351* (1975), 61 D.L.R. (3d) 741, [1976] 1 W.W.R. 341 (B.C.S.C.), and *Borza v. Banner* (1975), 60 D.L.R. (3d) 304 (B.C. Co. Ct.).

discovery and at trial. As long as judges and juries continue in this manner, large punitive damages awards, reflecting wealth adjustments, are not likely to occur in Ontario.

In the view of the Commission, the current approach in Ontario is appropriate. Any attempt to achieve precision in the manner in which the wealth of the defendant is factored into the quantification of punitive damages would lead, inevitably, to the intractable difficulties identified above. Moreover, at present, the court has the discretion to defer discovery into wealth until liability has been established. We believe that an inquiry into the wealth of the defendant should be permitted in appropriate circumstances, and that a bifurcated trial might be an appropriate way to deal with this issue in certain cases. We are confident that the sound judgment exercised by the judiciary in controlling inquiry into the defendant's wealth will continue. Accordingly, the Commission recommends that the present discretion of the courts to control inquiry into the defendant's wealth should continue.*

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* Statement of Dissent by Commissioner Margaret A. Ross, concurred in by Rosalie S. Abella, Chair

In the section of this Report dealing with the principles of quantification, the Commission affirms that the purpose of an award of punitive damages should be to punish the wrongdoer, that an award of punitive damages should be quantified on sound retributive principles and it recommends that the quantum of punitive damages should be proportional to the wrong. Further, the Commission recommends that the requirement that the punishment be quantified with reference only to the tort committed against the plaintiff should be retained and that the award should be made to punish the defendant for the act that caused the plaintiff's injury.

In concurring with those statements and recommendations, we are nonetheless unable to accept the conclusion that the wealth of the defendant is relevant either in determining the appropriateness or quantum of punitive damages. Our fellow Commissioners are prepared to endorse the current approach in Ontario that an enquiry into the wealth of the defendant is relevant and should be permitted, with discretion left to the trial Judge as to when that enquiry should occur and its extent.

Our view is that the wealth of the defendant should not be a relevant consideration either at the stage of determining whether an award of punitive damages is appropriate, or at the stage of determining the quantum of that award.

Firstly, if one acknowledges that the award should be quantified on sound retributive principles and should be proportional to the wrong done to the plaintiff, then it does not logically follow that the wealth of the defendant is a relevant consideration.

Secondly, to determine the impact of an award of punitive damages on different defendants would require that Courts make, or permit to be made, investigations into financial status and to attempt to reach meaningful conclusions from those investigations. Is the defendant's wealth to be assessed as of the time of the wrongdoing or at the time of the investigation? In the case of a corporate defendant is the relative wealth of its shareholders a relevant consideration (or the wealth of its affiliates/subsidiaries)?

The report acknowledges the difficulties which could arise as a result of the defendant being required to disclose its financial position in the context of an action which claims punitive damages. The best statement of these difficulties occurs in the form of a quotation from Schlueter and Redden, *Punitive Damages* (2d ed., 1989), Vol. I, § 5.3(F)(2), at 203:

> The first possible effect concerning the discovery of a defendant's wealth is where

(iii) Relationship to Other Damages

As indicated above, judges should, and do, take into account any other punitive sanction arising from the same conduct when assessing punitive damages. It remains to consider the relationship between damages awarded for other purposes, and punitive damages awarded for the purpose of punishment alone.

Compensatory damages, including damages for injury to pride and dignity, are not awarded for the purpose of punishment, but they may have

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> disclosure upon a mere allegation of conduct giving rise to a recovery of punitive damages would be detrimental. The second possible effect is the unnecessary intrusion by the plaintiff into the defendant's personal financial affairs when no basis for punitive damages has been established. Third, plaintiffs may use a request for defendants to produce information for the purpose of coercing the defendant to settle an unmeritorious claim. Finally, the expense and inconvenience associated with such a request may cause hardship on the defendant.

It must also be borne in mind that frequently the defendant will be a competitor of the plaintiff and it takes little imagination to realize the competitive advantage to a plaintiff who, merely by claiming punitive damages, would get the right to have the defendant's financial affairs disclosed. We believe that the potential for abuse of such a process outweighs any benefit to be gained by making the defendant's wealth a relevant consideration.

If wealth is to be considered relevant, however, then any enquiry must be prohibited until after a judicial determination has been made that punitive damages are appropriate. A mere claim for punitive damages ought not to suffice to allow the plaintiff to discover into the defendant's wealth.

The Commission Report argues that the Courts now have a discretion to defer discovery into wealth until such time as liability has been established. The relevant Rule of Civil Procedure (31.06(5)) on divided discovery reads as follows:

> Where information may become relevant only after the determination of an issue in the action and the disclosure of the information before the issue is determined would seriously prejudice a party, the Court on the party's motion may grant leave to withhold the information until after the issue has been determined.

While this Rule does affirm the discretion of the Courts to defer an enquiry into wealth, it places the onus on the defendant seeking to avoid such enquiry to demonstrate to the satisfaction of the Court that serious prejudice would ensue. We would take the position that an enquiry into wealth prior to a judicial determination that punitive damages are appropriate, would be *prima facie* evidence of serious prejudice and that there should be a presumption that no such enquiry take place until after judgment.

It will be argued that an enquiry into the defendant's wealth must be available to the plaintiff in order to allow the plaintiff sufficient opportunity to assess whether to pursue a claim for punitive damages. This might be an appropriate consideration if a claim for punitive damages were the sole claim being made in any action. We submit this is no different from the considerations of any plaintiff in deciding to pursue a claim in circumstances where the defendant might be impecunious and "judgment proof". However, again accepting that the punishment component of punitive damages should be quantified with reference only to the defendant's conduct (and proportionate to the wrong), the plaintiff should be required to proceed on the basis of demonstrating to the Court the defendant's conduct and whether, as a matter of principle, it is deserving of an award of punitive damages. It would then be open to the Court to arrive at an award of punitive damages in a proper case, which award would be quantified with reference to the conduct and not with reference to the wealth of the defendant.

a punitive effect. The House of Lords has held that exemplary damages awards should take the punitive effect of the compensatory award into account.[70] In principle, this is sound. The compensatory award may well have achieved the punitive goal, rendering a further award for the purpose of punishment unnecessary. The difficulty is that, in practice, most compensatory awards will be paid by an insurer. Any punitive effect otherwise inherent in such a compensatory award would be rendered ineffective. On balance, the Commission recommends that punitive damages should be quantified without regard to the assessment of compensatory damages. However, the fact that the defendant is insured against the risk of liability may have an impact on the defendant's wealth, and, as we discussed in the previous section, the defendant's wealth is a relevant consideration in the quantification of punitive damages.

(e) UNCERTAINTY IN THE DEFINITION OF THE "OFFENCE"

It has been objected that the definition of the "offence" that would trigger an award of punitive damages is too vague.[71] Potential violators, it is argued, should be given adequate prior notice of what forms of conduct will attract punishment. The Commission agrees with this principle, but is of the view that it is not violated by punitive damages in tort.

As we recommended earlier,[72] a threshold condition for punitive damages is advertent wrongdoing, that is, that the defendant knew, or ought to have known, that the act was wrong. What is alleged to be vague in the civil action is the meaning of the further requirement that the conduct be "exceptional". However, as we have already indicated,[73] advertent tortious conduct is itself sufficient to justify punishment, without the further requirement that the conduct be exceptional. Although we recommended earlier that punitive damages should be limited to cases of exceptional conduct, this limitation was intended, in part, to avoid an undesirable intrusion into the federal criminal jurisdiction. It was also in recognition of the fact that punitive damages were developed as an exceptional civil remedy for exceptional conduct, and not as a general civil commitment to punishment. However, these reasons have the effect of immunizing from punishment conduct that is otherwise deserving of punishment, and known to be so by the defendant. In our view, a defendant ought not to be permitted to complain that the circumstances in which she might be spared deserved punishment are vague. Uncertainty about whether the exceptional conduct condition will be met might be of concern in an exemplary damages regime based on the economic deterrence rationale, but poses no problem under our punitive damages regime based on retributive justice.

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[70] *Rookes v. Barnard*, *supra*, note 20, at 1228, and *Cassell & Co. Ltd. v. Broome*, *supra*, note 24, at 1062, 1072, and 1089. Of course, some defendants are punished in the criminal courts, and are also held liable for civil damages. As a practical matter, however, the criminal court is unable to take into account the possibility of future civil liability. The plaintiff's claim for compensatory damages cannot be reduced to reflect prior punishment.

[71] See *supra*, ch. 3. See, also, Cooper-Stephenson and Saunders, *supra*, note 41, at 713, and *Cassell & Co. Ltd. v. Broome*, *supra*, note 24, at 1087.

[72] *Supra*, this ch., sec. 2(c).

[73] *Ibid.*

(f) THE CIVIL BURDEN OF PROOF

Another objection raised to civil punishment is that punitive damages may be imposed where the plaintiff proves her case on a mere balance of probabilities, rather than on the higher criminal standard, which requires proof beyond a reasonable doubt. Behind this objection lies the important concern that, as a society, we have chosen to accept unjustified findings of innocence in order to avoid unjustified findings of guilt. In the view of the Commission, this objection is met by the requirement of exceptional conduct. Although it might be theoretically possible, it is extremely unlikely that a person who is found to have acted exceptionally, that is, outrageously, or maliciously, will have been wrongly found to have committed a tort advertently. Moreover, in view of the fact that the consequences of an award of punitive damages are less serious than the consequences of a criminal conviction, the different burdens of proof do not, in our view, pose a real difficulty. We have reached the same conclusion with respect to the other procedural safeguards applied in criminal, but not in civil trials.[74]

One option, adopted in some American states,[75] would be to specify that the case for punitive damages must be proven by "clear and convincing evidence",[76] or even beyond a reasonable doubt.[77] This would particularly complicate jury trials, since the jury would be required to apply one standard of proof to compensatory damages and a different standard of proof to punitive damages. Presumably, it would make awards of punitive damages even more difficult to obtain than they are now. On balance, the Commission recommends that the rule requiring the plaintiff to satisfy the ordinary civil burden of proof should be retained.

(g) WINDFALL BENEFIT TO THE PLAINTIFF

Another common objection to punitive damages is that they constitute a windfall benefit for the plaintiff. This is used to suggest either that they should be abolished or that some vehicle should be devised to direct the damages, in whole or part, to the state or other interested parties.

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[74] See the discussion *supra*, ch. 3.

[75] See Schlueter and Redden, *supra*, note 67, Vol. 1, § 9.13, at 586.

[76] The American College of Trial Lawyers endorsed this standard. See American College of Trial Lawyers, *supra*, note 57, at 15.

[77] See, for example, Colorado Rev. Stat. § 13-25-127(2) (1987).

It is inherent in the concept of punitive damages in tort that the action should be maintained by the plaintiff. Litigation is expensive, particularly in the case of a claim for punitive damages. It follows that if we regard the punitive function of tort law as valuable, we must be prepared to pay plaintiffs to give effect to it.[78] Ideally, from the plaintiff inducement point of view, anticipated punitive damages, discounted by the risk and consequences of failure, must match the financial and other costs attributable to the punitive claim, and perhaps provide some "normal" return on the effort.

We understand, from counsel who responded to inquiries made in connection with this project, that this is often not the case. That is, many otherwise valid cases for punitive damages are simply not worth pursuing. This may be either because the courts are reluctant to make punitive awards, or because the awards made are "too low". One reason why awards might be too low is that the proper retributive measure of punishment is less than the amount necessary to induce the punitive claim. Our society accepts that it is better to allow some to escape punishment than to punish others excessively.

The term "windfall" is a pejorative one. It conjures up the image of someone reaping an undeserved financial reward. That image has nothing to do with the successful tort plaintiff who recovers punitive damages.[79] Unless the punitive award meets the inducement criteria discussed above, the "successful" plaintiff will experience a financial loss in the litigation. The alleged problem with windfall recovery arises only where the retributive measure of punishment exceeds substantially the amount necessary to induce enforcement. In these circumstances, the plaintiff would profit from the punitive claim.

Other things being equal, "windfall" cases would be those where the conduct is deserving of relatively greater punishment. If punitive damages claims are suppressed in such cases, the real windfall benefits would be obtained by defendants who have committed the most egregious acts. If some benefit is inevitable, perhaps it is more desirable that it go to victims, often victims of personal injury, who have expended resources in pursuing the claim, rather than to those deserving of substantial punishment. Wrongdoers as a class already benefit whenever the retributive measure of punitive damages is less than that needed to induce the action for punitive damages.

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[78] It should be noted that, in at least some cases, plaintiffs appear to be motivated to seek punitive judgments by considerations other than money. See *supra*, note 10, and accompanying text.

[79] Another image that is sometimes invoked is to portray plaintiffs in exemplary damages cases as bounty hunters. However, the conditions that the plaintiff must be the victim of the conduct deserving of punishment, and that the punishment must relate to that conduct alone, renders this image meaningless in Ontario. The notion that people might allow themselves to become victims of advertent wrongdoing so deserving of punishment that the total award will exceed their anticipated compensatory damages is absurd. In fact, exemplary damages are available, and are worth pursuing, in a very limited set of circumstances, which are generally unpleasant, and which are determined *ex post facto*, not planned for profit in advance.

Moreover, as we suggested above, there is no evidence in Ontario that plaintiffs are securing routinely punitive awards in excess of the amount necessary to induce the action. We do not believe, therefore, that true cases of windfall benefit are sufficiently numerous or objectionable to warrant concern.

4. MISCELLANEOUS ISSUES

(a) MULTIPLE DEFENDANTS

(i) Vicarious Liability

In Canada it appears that the courts will hold employers vicariously liable for punitive damages; that is, employers will be held liable, without fault, for punitive damages awarded against an employee acting in the course of employment.[80] The case for and against doing so has not received attention expressly. It is often unclear whether employer liability is truly vicarious, or whether it would satisfy the complicity test, discussed below. Moreover, a principled resolution of this issue depends, to a large extent, on the purpose of the award, since the arguments differ for compensation and deterrence on the one hand, and punishment on the other.

It would appear that the various jurisdictions in the United States are divided on this issue. Some follow the ordinary *respondeat superior* rule, while others follow a variation of the complicity rule, which requires managerial authorization or ratification, or reckless hiring or retention of an unfit employee.[81] Scholars are also divided on the issue.[82] Again, this is complicated by the multiple purposes served by the awards there.

In the present context, since the punitive function has been isolated, the analysis may be simplified somewhat. One of the functions served by vicarious liability is that it locates a solvent defendant, perhaps one who can spread the loss. This factor is irrelevant here because punitive damages are not awarded for the purpose of providing compensation. Vicarious liability also serves a deterrence function. The employer is in a good position to assess the risk and to adjust hiring and supervision policies accordingly. Again, deterrence in this sense is not the primary function of punitive damages. It violates retributive justice to punish an innocent party. This analysis suggests that some variation of the complicity rule is appropriate.

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[80] See, for example, *Munro v. Toronto Sun Publishing Corp.* (1982), 39 O.R. (2d) 100, 21 C.C.L.T. 261 (H.C.J.), and *Dalsin v. T. Eaton Co. Canada Ltd.* (1975), 63 D.L.R. (3d) 565, [1976] W.W.R. 28, (Alta. Dist. Ct.). See, also, Waddams, *supra*, note 40, para. 1018, at 587; Cooper-Stephenson and Saunders, *supra*, note 41, at 705-07; and Cherniak and Morse, *supra*, note 53, at 199.

[81] Ellis, *supra*, note 2, at 63. The latter is the position taken in American Law Institute, *Restatement of the Law, Second – Torts 2d* (1979), § 909, and endorsed by the American College of Trial Lawyers, *supra*, note 57, at 16.

[82] Ellis, *supra*, note 2, at 63.

The main problem is the practical difficulty of proving complicity. An employer may prohibit certain conduct expressly, and management may in no way associate itself with such conduct. Nevertheless, tacit approval of tortious conduct that benefits the employer is always a possibility. A rule similar to that used in criminal courts in some jurisdictions in the United States, where *mens rea* is attributed vicariously to a corporation on the basis of a mental state of an agent acting with intent to benefit the corporation, might be an appropriate solution to address this concern.[83] On balance, we have concluded, and therefore recommend, that the courts should be directed to develop a rule of vicarious liability that is narrower than the ordinary *respondeat superior* rule used for compensatory damages, such that an employer would be vicariously liable for punitive damages only in the case of complicity, that is, where the employer tacitly approved of the employee's conduct. This, of course, would establish a somewhat new regime, and it is not possible to anticipate all of the various fact situations that might arise in the future. Accordingly, in our view, the courts should be encouraged to develop appropriate standards on a case by case basis. Moreover, the Commission further recommends that, in the case of punitive damages, the court should be required to choose between vicarious liability, either for the full amount of punitive damages or for a portion of that amount, or no employer liability for punitive damages. This would ensure that vicarious liability is not imposed unreflectively. Of course, nothing in this section is intended to limit the independent or direct liability of an employer for its own torts, for which punitive damages might be imposed.

We recommended earlier that the regime for punitive damages proposed in this report should apply equally to corporations and individuals.[84] The approach to vicarious liability, recommended above, should bring responsibility home to managerial wrongdoers in many cases. Moreover, it should be noted that corporations may seek indemnity from those actors if they wish to do so.

(ii) Concurrent Wrongdoers

Unique difficulties arise with respect to punitive damages in cases involving concurrent wrongdoers. These difficulties are most obvious where the conduct of onlyone concurrent wrongdoer warrants an award of punitive damages. Similar concerns also arise, however, where the conduct of each of two or more concurrent wrongdoers warrants an award of punitive damages, but in different amounts.

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[83] *Ibid.*, at 62, *n*.170.

[84] See *supra*, this ch., sec. 2(c).

The Canadian courts have adopted what we believe to be the most equitable solution. In practice, while the courts impose joint and several liability for compensatory damages,[85] they seem to impose only several liability for punitive damages.[86] In a number of cases involving concurrent wrongdoers, the courts have entered a judgment for compensatory damages against both defendants, but have entered a separate judgment for punitive damages against one of the defendants only.[87] In the view of the Commission, the present practice best achieves the retributive goal by punishing each defendant in proportion to her own wrongdoing. Accordingly, the Commission recommends that, in the case of concurrent wrongdoers, a separate judgment for punitive damages should be entered against each concurrent wrongdoer held liable for such damages.[88]

(b) SURVIVAL OF CLAIMS

No Ontario legislation addresses specifically the issue whether a cause of action for punitive damages survives for the benefit of an estate of a deceased victim. Six provinces have declared that it does not.[89] The rationale in favour of permitting the survival of a claim for punitive damages have been stated as follows:[90]

> - A wrongdoer can be punished just as easily, whether his or her victim lives or dies.
>
> - Deterrence is furthered when other potential tortfeasors learn that the death of their potential victims will not stop the imposition of punitive damages.
>
> - It would be manifestly unjust to allow a wrongdoer to escape civil punishment by the 'fortuity' of his or her victim's death, if the punishment would have been meted out should the victim have survived the tort.

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[85] As to the liability of concurrent wrongdoers generally, see Ontario Law Reform Commission, *Report on Contribution Among Wrongdoers and Contributory Negligence* (1988).

[86] See Cooper-Stephenson and Saunders, *supra*, note 41, at 707-08.

[87] See, for example, *Townsview Properties Ltd. v. Sun Construction and Equipment Co. Ltd.* (1974), 7 O.R. (2d) 666, 56 D.L.R. (3d) 330 (C.A.), and *Gillett v. Nissen Volkswagen Ltd.* (1975), 58 D.L.R. (3d) 104, [1975] 3 W.W.R. 520 (Alta. S.C., T.D.).

[88] This approach is supported by Waddams, *supra*, note 40, para. 1017, at 587, and Cooper-Stephenson and Saunders, *supra*, note 41, at 708-09. See, also, the references cited in Cooper-Stephenson and Saunders, *ibid.*, n. 47.

[89] See Cooper-Stephenson and Saunders, *ibid.*, at 689.

[90] Burton, "Punishing the Dead: Whether the Estates of Dead Tortfeasors Should Be Responsible for Punitive Damages" (1989-90), 12 U. Ark. Little Rock L.J. 283, at 289.

While the ends of punishment and deterrence would thus be better served by allowing such claims to survive, the legislation elsewhere seems to reflect the "personal" aspect of the claim. The Commission finds the rationale quoted above compelling. In view of the retributive rationale adopted for punitive damages, the Commission recommends that, in the event of the death of the plaintiff, a claim for punitive damages should survive for the benefit of the estate.

However, "[t]he issue of whether representatives of a dead victim can recover damages against a living tortfeasor is a completely different question, with a completely different set of policies and analyses, than the issue of whether a victim or his estate can recover punitive damages against the estate of a deceased wrongdoer".[91] There is no Ontario legislation precluding an action for exemplary damages against an estate. In the United States, it would appear that every state that has considered the issue, in those jurisdictions in which punitive damages may be awarded for the purposes of punishment and deterrence only – and not for the purpose of compensation – has rejected the notion that a claim for punitive damages should be permitted against the estate of a deceased wrongdoer.[92]

General deterrence, and recognition of the personal nature of the claim, suggest that such an action should be permitted.[93] A justification constructed on the basis of the deterrence rationale would emphasize the fact that a potential wrongdoer might be deterred by the threat of having her estate reduced by an award of punitive damages.[94] In response, however, it is suggested that in such a case, punishment would actually be inflicted upon the wrongdoer's innocent heirs, and "a free nation generally is not willing to obtain deterrence by means such as punishing the innocent".[95] A purely punitive rationale would suggest that the action should not be allowed. "Visiting punishment upon the innocent heirs of a deceased wrongdoer does not further the ends of punitive damages . . . or comport with good social policy."[96] Moreover, it should be emphasized that the injured plaintiff is not being "cheated" out of her punitive damages award by the death of the defendant.[97] Punitive damages are not awarded for the purpose of compensating or benefitting the plaintiff. Accordingly the Commission recommends that, in the event of the death of the tortfeasor, a claim for punitive damages should not be permitted against the estate.

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[91] *Ibid.*, at 288.

[92] *Ibid.*, at 284-85.

[93] See *Breitkreutz v. Public Trustee* (1978), 11 A.R. 228, 89 D.L.R. (3d) 442 (S.C., T.D.), where such a claim was considered, but rejected on the unusual facts of the case.

[94] Burton, *supra*, note 90, at 292-94.

[95] *Ibid.*, at 295.

[96] *Ibid.*, at 300.

[97] *Ibid.*, at 299.

CHAPTER 7

TORT RESULTING IN PROFIT: PUNITIVE DAMAGES AND RESTITUTION

In this chapter, we consider the case in which the tortfeasor's benefit from the tort exceeds the compensatory damages payable to the victim. In such a case, where restitution is available to the victim, the defendant is merely returned to the position she would have been in had she not committed the tort. The issue is thus whether it might be appropriate to leave the tortfeasor in a worse position, through a further award of punitive damages.

Where a tortfeasor is permitted to benefit from a tort, even after full compensatory damages have been paid to the victim, the tort, in effect, has been licensed. The suggestion implicit in such a result is that the conduct is not wrongful, provided full compensation is paid.

There exists considerable controversy in the restitutionary case law and literature as to which torts may be waived by the plaintiff, in order to permit the plaintiff to pursue a restitutionary claim and thereby recover the defendant's benefit, rather than compensatory damages. Where waiver of the tort is not permitted, and the defendant is permitted to retain any profit resulting from the tort after the plaintiff is compensated fully, as we indicated above, the commission of the tort, in effect, is licensed upon payment of compensation. However, such an outcome has never been justified by the theory that the tort is not a wrong if full compensation is paid.[1] Rather, the failure to endorse waiver of tort in all tort actions is better explained by concerns with the appropriateness of restitutionary remedies in particular cases than by a principled belief that the wrong is extinguished by the payment of compensatory damages.

Some commentators suggest that it should be permissible to waive all torts that result in a benefit, and to recover the benefit obtained from the wrongful conduct.[2] Others would restrict waiver somewhat, for example, to interferences with proprietary rights, or anti-enrichment wrongs.[3] However, there is virtual unanimity that waiver and recovery of benefit should be allowed in any case of deliberate or advertent wrongdoing. Debates concern only the further application of the restitutionary principle.

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[1] Only the exceptional defense of private necessity seems to reflect such a deliberate judicial conclusion.

[2] See, for example, Maddaugh and McCamus, *The Law of Restitution* (1990), at 514-21; Goff and Jones, *The Law of Restitution* (3d ed., 1986), at 612-13; and Fridman and McLeod, *Restitution* (1982), at 547.

[3] See, for example, Friedmann, "Restitution of Benefits Obtained Through the Appropriation of Property or the Commission of a Wrong" (1980), 80 Colum. L. Rev. 504, and Birks, *An Introduction to the Law of Restitution* (1985), at 328. "Anti-enrichment wrongs" are

The restitutionary remedy is relevant to the issue of punitive damages in a case in which the defendant's benefit exceeds the plaintiff's loss, and in which the defendant's conduct is thought to justify civil punishment.[4] It might be the case that, after paying both compensatory damages and punitive damages, the benefits derived from the tort exceed total liability. Merely stripping the profits from wrongdoing is not punitive. However, unless the tortfeasor is first stripped of the benefits of the wrong in appropriate cases, and restored to a financially neutral position, meaningful financial punishment cannot be effected.

One of the difficulties with the present law is that where waiver of tort is permitted, and the plaintiff elects the restitutionary remedy to recover the profits made by the defendant, the plaintiff is precluded from also recovering exemplary damages in tort. In such a case, under the law of restitution, the defendant would merely be returned to the position she would have been in had she not committed the tort, notwithstanding the fact that the circumstances merited further deterrence or punishment. The Commission therefore recommends that where a plaintiff waives a tort committed by the defendant, and pursues a restitutionary remedy, she should also be entitled to claim punitive damages in an appropriate case,[5] that is, where such damages would otherwise be available under the recommendations made in this report.

At present, it seems that the courts might not be accomplishing their objectives, either in meritorious restitutionary claims, or in respect of their expressed desire to punish the wrongdoer. Frequently, the courts are unclear about the interaction between punishment and the benefits derived from wrongdoing, awarding punitive damages to punish the defendant, but acknowledging that the amount of such damages is insufficient to extract

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described *ibid.*, at 328, in the following terms:

> The test proposed under this head supposes that some wrongs are, and some wrongs are not, recognized by the law for the purpose of preventing disapproved modes of enrichment. More accurately this means that the primary duties, of which the wrongs are breaches, either are or are not designed to prevent enrichment. If an anti-enrichment duty is broken, so that the preventitive mechanism has failed, the policy behind the duty can be redeemed by ordering restitution from the wrongdoer. On the other hand, if the duty which has been broken is not aimed against enrichment, restitution cannot be congruently related to the policy behind it and should not be allowed.

[4] The same analysis applies to the deterrence case for exemplary damages.

[5] See, for example, the *Environmental Protection Act*, R.S.O. 1980, c. 141, s. 146c, as en. by S.O. 1986, c. 68, s. 15. This authorizes a fine equal to the convicted party's benefit in addition to any other penalty. See, also, Vaver, "Infringing Copyright in a Competitor's Advertising: 'At Large' Damages Can Be Large Damages" (1985), 1 Int Prop. J. 186, at 190-93.

the profits derived by the defendant from the tort.[6] In our view, permitting a claim for punitive damages to be brought in addition to a restitutionary claim should assist the court in accomplishing both objectives.

Finally, we should refer to the recent decision of the Ontario Court of Appeal in *Claiborne Industries Ltd. v. National Bank of Canada*.[7] Punitive damages in the amount of $4,800,000 were awarded in an action for conspiracy. The Bank was found to have conspired with one Black who had appropriated sums from a public company, Claiborne, to his personal accounts. In the course of this conspiracy, the Bank encouraged Black to acquire what eventually amounted to fifty-six percent of the shares in Claiborne to be held as security by the Bank for Black's personal indebtedness. After this action the Bank will be required to sell those shares. The selling price will reflect the approximately $7,000,000 in compensatory damages the Bank was required to pay Claiborne, and a further premium reflecting the value of the controlling block of shares. Through a series of estimates, the court reasoned that seventy percent of the damages that the Bank had to pay Claiborne would revert to the Bank when it sells the shares. Applying the principle that the Bank should not profit from its wrong, the court assessed punitive damages in an amount to prevent the Bank from benefitting when it sold the shares. This amounted to seventy percent of the compensatory damages, or $4,800,000.

If the Bank had truly benefitted from its misconduct to the extent of $4,800,000, and if that benefit had been acquired at the plaintiff's expense, this would be an extraordinarily large, but otherwise unexceptional, application of equitable principles of restitution. There might well have been a compensatory aspect to the award.

As a matter of principle, it is incorrect to award both compensatory damages and punitive damages in the nature of restitution. The acquisition of the shares cannot be viewed as an isolated wrong. In itself, this was not tortious and was, as pointed out at trial, a sound exercise of business judgment. Conspiracy is a single continuing wrong, of which the share transaction was but one aspect. As McKinlay J.A. observed, the Bank did not profit from the conspiracy. The Bank lost thirty percent more in damages than it allegedly gained. Moreover, the value of the securities appears to have been insufficient to meet the indebtedness of Black for which the Bank was responsible.

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[6] See, for example, *Canadian Ironworkers Union No. 1 v. International Association of Bridge Structural & Ornamental Ironworkers Union Local 97* (1972), 31 D.L.R. (3d) 750, [1973] 1 W.W.R. 350 (B.C.S.C.), aff'd (1974), 45 D.L.R. (3d) 768 (B.C.C.A.); *Fletcher v. Norcen Energy Resources Ltd.* (1985), 41 Alta. L.R. (2d) 213, 67 A.R. 21 (Q.B.); and *Townsview Properties Ltd. v. Sun Construction and Equipment Co. Ltd.* (1973), 2 O.R. (2d) 213, 42 D.L.R. (3d) 353 (H.C.J.), varied (1974), 7 O.R. (2d) 666, 56 D.L.R. (3d) 330 (C.A.). See, however, *Austin v. Rescon Construction (1984) Ltd.* (1989), 36 B.C.L.R. (2d) 21, 57 D.L.R. (4th) 591 (C.A.). The appellate court increased exemplary damages awarded at trial to achieve the express purpose of stripping the benefit. It is unclear whether the court considered whether an additional sum for the purpose of punishment or deterrence might have been in order. See, also, *Johnson v. British Columbia Hydro and Power Authority* (1981), 27 B.C.L.R. 50, 123 D.L.R. (3d) 340 (S.C.) where expenditure saved from the tort was the basis of the compensatory award, and punitive damages given in addition.

[7] (1989), 69 O.R. (2d) 65, 59 D.L.R. (4th) 533.

It appears that some of the acts that devalued the company were committed before the Bank acquired most of the shares,[8] and some after. The case is unclear in this respect, but it is relevant. After the Bank took the shares as security, any act by Black that devalued the shares also devalued the Bank's security. From that point on, the Bank, as co-conspirator, was injuring itself rather than reducing its liability. As such, there is nothing objectionable in allowing the Bank to compensate itself, as long as it compensates the others.

When the Bank acquired the shares as security, it acquired them at a price devalued by Black's wrongdoing. As a co-conspirator it may be deemed to have known that it would have to compensate the company for this. It is true that the Bank reduced its exposure by becoming a shareholder of the plaintiff company. Still, this is reducing its liability, not profiting from the wrong. If anyone was injured, it was not the plaintiffs, but the shareholders other than Black who sold the devalued shares.[9] Presumably, these shareholders may bring an action against the Bank under the insider trading provisions,[10] and recover their losses.[11] Presumably, they may still do so and expose the Bank to even further liability. Actions of this sort will accomplish the goals the court sought to achieve without granting the present shareholders a windfall recovery.[12]

In summary, the decision in *Claiborne Industries Ltd. v. National Bank of Canada* appears to ignore the traditional requirement that punitive damages pertain to a tortious act committed against the plaintiff and, as a consequence, results in a large windfall recovery for the plaintiffs. The defendant did not benefit generally from the conspiracy, so the restitutionary approach is inappropriate. It did benefit from one aspect of the conspiracy, but not to the extent of $4,800,000. The insider trading rules exist to accomplish what the court sought to accomplish with punitive damages, and ensure that the damages are payable to those so injured. There may well exist a valid case for punitive damages in *Claiborne* to punish advertent wrongdoing committed for the purpose of making a profit. In the circumstances, such an award might be considerably larger than is common in Canada.[13] Given the exceptional facts in this case, and the way in which the court rationalized the use of punitive damages, we are not convinced that the amount of the award itself reflects a new pattern in the awarding of punitive damages.

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[8] The Bank held 16% of the shares before the torts were committed. This the court notes, but concludes somehow that the devaluation was offset by the fact that these shares formed part of a control block that would be sold at a premium.

[9] Similarly, the Bank only benefitted to the extent that the shares were not owned already by Black. The Bank would not have been liable to Black had he remained a shareholder of Claiborne. The judgment indicates that most if not all of the shares were either owned or controlled by Black already, but it is not known whether and to what extent any third party's holdings were affected.

[10] *Securities Act*, R.S.O. 1980, c. 466, ss. 101 *et seq.*

[11] See Welling, *Corporate Law in Canada*[:] *The Governing Principles* (1984), at 364-71. Liability under these provisions is not dissimilar to liability for punitive damages of a restitutionary nature.

[12] As pointed out by the dissent, the award violates the requirement that the benefit must be earned at the plaintiff's expense. Here, the insider trading rules appear to allow appropriate recovery and to direct it to those who have some legitimate claim. See *Securities Act, supra*, note 10, s. 131, as am. by S.O. 1987, c. 7, s. 14(1).

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[13] The trial judge awarded $300,000.

CHAPTER 8

NEGLIGENCE, NUISANCE, AND EQUITABLE WRONGS

1. INTRODUCTION

The analysis thus far has excluded the issues of punitive damages in negligence, nuisance, and equitable wrongs. Below we consider the questions whether, and to what extent, the earlier analysis may be applied to these actions.

2. NEGLIGENCE

Despite the frequency with which exemplary damages are now claimed in actions for negligence,[1] there is relatively little discussion of the issue in the case law, and only a few such awards have been made. The law in England leaves little scope for exemplary damages in negligence.[2] However, the door to such a claim was left open, albeit unconvincingly, by the Ontario Court of Appeal in 1958.[3]

The leading Canadian case in which exemplary damages were awarded in an action for negligence is *Robitaille v. Vancouver Hockey Club Ltd.*[4] The case was an unusual one for negligence, consisting of a prolonged deliberate failure to provide medical attention to a professional hockey player, a deliberate refusal to protect him from further injury by making him play while injured, and a deliberate attempt to humiliate him.

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[1] See *supra*, ch. 4, sec. 3.

[2] It would seem possible to bring such a claim within the tort for profit category. But see *Cassell & Co. Ltd. v. Broome*, [1972] A.C. 1027, at 1088, [1972] 2 W.L.R. 645, at 685 (H.L.) *per* Lord Reid. See, also, *Emblen v. Myers* (1860), 158 E.R. 23 (Ex. Div.).

[3] In *Denison v. Fawcett*, [1958] O.R. 312, at 319, 12 D.L.R. (2d) 537, at 542 (C.A.), Schroeder J.A. said: "[g]enerally . . . such damages may be awarded in actions of tort such as assault, trespass, negligence, nuisance, libel, slander, seduction, malicious prosecution and false imprisonment". See the discussion of this case in Cherniak and Morse, "Aggravated, Punitive and Exemplary Damages in Canada", in *Special Lectures of the Law Society Of Upper Canada 1983*[:] *Torts in the 80s* (1983) 151, at 172-74. See, also, *Blacquiere's Estate v. Canadian Motor Sales Corp*. (1975), 10 Nfld. & P.E.I. 178, 17 A.P.R. 178 (P.E.I.S.C.). Although these are the authorities relied upon in the recent cases, see, also, *Jackson v. Canadian Pacific Ry. Co.* (1915), 24 D.L.R. 380, at 387, 8 W.W.R. 1043, at 1050 (Alta. S.C., App. Div.), aff'd (1915), 52 S.C.R. 281, 27 D.L.R. 86.

[4] (1979), 19 B.C.L.R. 158, 103 D.L.R. (3d) 85 (S.C.), aff'd 30 B.C.L.R. 286, at 313, 124 D.L.R. (3d) 228, at 253 (C.A.). The first punitive award in an action for negligence may have been in *Rowland's Transport Ltd. v. Nasby Sales & Services Ltd.* (1978), 16 A.R. 192 (S.C., T.D.).

It seems that most of the blended $35,000 award was for aggravated damages, not exemplary damages. By blending aggravated and exemplary damages in a single award, the decision in *Robitaille v. Vancouver Hockey Club Ltd.* implicated aggravated damages in the controversy regarding the availability of exemplary damages in cases of negligence. In the view of the Commission, this is unnecessary. We recommend that our earlier proposal respecting damages for injuries to pride and dignity[5] should apply to actions in negligence.[6]

Robitaille v. Vancouver Hockey Club Ltd. also established that intent, as that term is defined in the context of the intentional torts, is not a prerequisite to exemplary damages. The trial judge emphasized that the conduct was advertently wrong, and the appellate court that it was "blameworthy". This case was cited with approval recently in the Supreme Court of Canada,[7] apparently confirming the beginning of a trend that approves of exemplary damages in negligence cases.[8]

The general claim for punitive damages recommended earlier in this report requires that the tortious conduct must have been advertent and exceptional. Ordinarily, negligence involves inadvertent conduct, the simple failure to exercise due care, and would be excluded from the scope of our other recommendations on that ground. However, some actions involving advertent harm may be actionable only in negligence.[9] For example, the fact that the harm is indirect takes such conduct out of the definition of many intentional torts.[10] At other times, there may be an intention or imputed intention to cause harm, but not an intention directed to the plaintiff specifically. In our view, provided the condition of advertent harm is applied, that is, that the defendant knew or ought to have known that the conduct posed an unreasonable risk, punitive damages may be awarded appropriately in negligence, although we believe that this will occur only rarely.[11]

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[5] *Supra*, ch. 5.

[6] Of course, if the common law of aggravated damages were left unmodified, there would still be no reason to preclude or limit their scope in actions for negligence. It should also be noted that the defence of contributory negligence should apply to compensatory damages, but not to punitive damages, unless the plaintiff's conduct amounts to provocation. In *Robitaille v. Vancouver Hockey Club Ltd.*, *supra*, note 4, the court declined to apply contribution to the entire exemplary award, although much of the undifferentiated award was for aggravated damages. See Cherniak and Morse, *supra*, note 3, at 203-04.

[7] *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193.

[8] Cases in which an award of punitive damages has been made in an action for negligence include *Apa v. McKay*, unreported (September, 1984, Ont. H.C.J.); *Coughlin v. Kuntz* (1987), 17 B.C.L.R. (2d) 365, 42 C.C.L.T. 142 (B.C.S.C.); and *MacDonald v. Sebastian* (1987), 81 N.S.R. (2d) 189, 43 D.L.R. (4th) 636 (S.C., T.D.). In this latter case, advertent negligence might have been misdescribed as battery. Cases approving of such an award in an appropriate case include *Vlchek v. Koshel* (1988), 52 D.L.R. (4th) 371, 44 C.C.L.T. 314 (B.C.S.C.) leave to appeal refused (1988), 52 D.L.R. (4th) 371*n* (B.C.C.A.), and *Heighington v. Ontario* (1987), 60 O.R. (2d) 641, 41 D.L.R. (4th) 208 (H.C.J.), additional reasons at 60 O.R. (2d) 655, 41 D.L.R. (4th) 222 (H.C.J.).

[9] See, for example, *Robitaille v. Vancouver Hockey Club Ltd.*, *supra*, note 4.

There remains some dispute, however, as to whether the plaintiff must meet a further condition, beyond establishing advertent exceptional conduct, in order to justify an award of exemplary damages in an action for negligence. Some cases suggest that the conduct also must "have been consciously directed against the person, reputation, or property of the plaintiff".[12]

The Commission recommends that punitive damages should be available, in accordance with our earlier proposals,[13] in an action for negligence. Moreover, while the plaintiff should be required to prove that she was a victim of such conduct, she should not be required, in our view, to prove that she was a specifically targeted victim.[14] Not only would such a requirement immunize a great deal of advertent wrongdoing from punitive damages, but there appears to be no reason in principle to adopt it.

One possible source of concern with punitive damages in negligence arises with respect to cases of systematic wrongdoing, where many people are exposed to risk but relatively few people are injured, and to so-called mass torts, where the wrongdoing actually results in many people being injured.

The practical concern, in a case of systematic wrongdoing or mass tort, that the plaintiff would receive a large windfall benefit if she were permitted to recover punitive damages calculated with reference to the defendant's entire course of conduct,[15] is addressed by the requirement for punitive damages generally that the award must be quantified as a proportionate response to the act that injured the plaintiff. The victim of an injury should be the only person permitted to claim punitive damages in respect of that injury.[16] As a practical matter, this requirement will restrict recovery in many cases to specifically targeted victims. It will also render the remedy of little use in deterring cases of systematic wrongdoing, where deterrence concerns are particularly acute.

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[10] But see *MacDonald v. Sebastian*, *supra*, note 8.

[11] We have rejected the adoption of a gross negligence standard, which would intrude into the domain of inadvertent conduct. The "ought to have known" requirement of advertent conduct might occasionally catch an inadvertent wrongdoer, but its main purpose is to make practicable a standard that would otherwise require a court to read the defendant's mind. A number of cases that might violate this recommendation are cited in Cooper-Stephenson and Saunders, *Personal Injury Damages in Canada* (1981), at 694-96. These cases, in our view, cannot be justified on a retributive rationale, although they might be justified on deterrence grounds, property theory, or special concerns with public authorities.

[12] *Kaytor v. Lion's Driving Range Ltd.* (1962), 35 D.L.R. (2d) 426, at 430, 40 W.W.R. 173, at 178 (B.C.S.C.). This additional requirement has been criticized in Cherniak and Morse, *supra*, note 3, at 171-73. *Kaytor v. Lion's Driving Range Ltd.* was followed in *Stamper v. Finnigan* (1988), 85 N.B.R. (2d) 404, at 441, 49 D.L.R. (4th) 342, at 359 (C.A.), *per* Stevenson J. Hoyt J.A., on the other hand, seemed to see virtually no scope for exemplary damages in negligence. However, Ryan J.A. would have awarded exemplary damages. Not all cases agree with the view taken in *Kaytor*. See, for example, *Vlchek v. Koshel*, *supra*, note 8.

[13] *Supra*, ch. 6.

[14] See *supra*, note 12, and accompanying text.

In summary, the concern is not with awarding punitive damages for advertent wrongdoing in cases of negligence *per se*. The difficulty rests with the shortcomings of traditional private tort litigation in cases of broadly dispersed wrongdoing. The answer, in our view, lies in amendments to the law of civil procedure. If these were forthcoming, and attention was given to the special issues that pertain to punitive damages, such damages could play a valuable role in controlling systematic wrongdoing.[17]

3. NUISANCE

Awards of punitive damages in nuisance[18] are potentially problematic in two respects, one of which mirrors a basic concern in the contract setting. We conclude, however, that neither potential problem warrants excluding nuisance from the scope of our earlier recommendations.

Liability in nuisance may be imposed even if the defendant's conduct is otherwise lawful, if the court concludes that it constitutes an unreasonable interference with the plaintiff's use and enjoyment of land. An advertent nuisance would occur when the defendant knew or ought to have known that the interference was unreasonable. *Prima facie*, the basic rationales for punitive damages would seem to apply to conduct of this sort.

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[15] For example, one might expect "racing" on the part of potential plaintiffs to be the first to file a claim. Moreover, if one plaintiff realizes a large punitive award, the defendant might be unable to meet its compensatory liabilities to other victims.

[16] A defendant who chooses a course of conduct, otherwise deserving of punishment, that exposes 1 in 10 people to a risk of injury should not be punished in addition for the acts that create the risk. It is not the case that the defendant attempted to injure all 10 people, in which case punishment for the attempts might be warranted in the ideal retributive regime. If those exposed to the risk did suffer an injury recognized at law, they would then be eligible for punitive damages.

[17] Class actions, for example, promise some response to the case for deterrence and punishment that may arise. See Ontario Law Reform Commission, *Report on Class Actions* (1982), and *Class Proceedings Act, 1990*, Bill 28, 1990 (35th Leg. 1st Sess.). See, also, Lockley, "Regulating Group Actions" (1989), 39 New L. J. 798. It would also be possible to direct payment of the punitive or exemplary damages, beyond the amount necessary to induce the action, to the state or a third party, such as a consumer protection or environmental lobby group. However, private litigation remains an awkward vehicle with which to take all the valid concerns into account. For example, such a judgment might prejudice others who later claim compensatory damages.

[18] "In general, a nuisance is an unreasonable interference with the use and enjoyment of land by its occupier or with the use and enjoyment of a public right to use and enjoy public rights of way": Linden, *Canadian Tort Law* (4th ed., 1988), at 493.

A concern arises, however, as to whether nuisance is an absolutely proscribed wrong.[19] When a court enjoins a nuisance it determines that the plaintiff's entitlement is one that is protected by a property rule, interference with which ought to be deterred. When the court declines to enjoin a nuisance, and limits recovery to past and future damages, it determines, in effect, that the entitlement is protected by a liability rule only.[20] This, perhaps more overtly than in other actions, amounts to licensing the tort upon payment of compensation. However, in Canada and England, the general rule is that a nuisance will be enjoined where the nuisance is continuing and substantial.[21] That is, for all practical purposes, a nuisance is regarded as an interference with a property right and ought to be treated similarly. It follows that punitive damages should not be excluded from nuisance on this ground.

The other concern is that the standard for liability in nuisance is somewhat elusive. It would be undesirable, in our view, to deter defendants from otherwise lawful conduct in cases in which the defendant could not be expected fairly to predict liability in nuisance. However, the requirement of advertence, that is, that the defendant either knew or ought to have known that the interference was unreasonable, should address this concern. On balance, the Commission recommends that punitive damages should be available, in accordance with our earlier proposals,[22] in cases of nuisance.

4. EQUITABLE WRONGS

In 1972 the Ontario Court of Appeal held that exemplary damages could not be awarded against a defendant who had fraudulently breached his fiduciary duty.[23] Two of the judges denied the claim on the bases that the action was equitable, not tortious,[24] and that there was no precedent to support it. The third judge added that the equitable remedy, which stripped the defendant of its anticipated gains, was sufficient punishment. This decision was followed recently in Ontario.[25] However, exemplary damages have been awarded in a number of cases dealing with breach of equitable duties, without any indication that this was controversial.[26] If there is any substantive, as opposed to historical or technical, objection to the award of exemplary damages in fiduciary or trust cases, it is not revealed in the case law. Given that damages of any sort are unusual in equitable actions, the absence of precedent for exemplary damages is not surprising.[27]

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[19] A similar concern arises in the case of contract. See *infra*, ch. 10.

[20] See Calabresi and Melamed, "Property Rules, Liability Rules and Inalienability: One View of the Cathedral" (1972), 85 Harv. L. Rev. 1089. See, also, *infra*, ch. 10.

[21] Fleming, *The Law of Torts* (7th ed., 1987), at 413. The requirements of continuous and substantial harm relate to the suitability of the exceptional remedy of injunction, not to the distinction between a property right and a property interest. Therefore, it would be incorrect to link the case for punitive damages to the case for an injunction. For example, restitution might be appropriate for benefits obtained from a nuisance that was no longer continuing.

[22] *Supra*, ch. 6.

[23] *Fern Brand Waxes Ltd. v. Pearl*, [1972] 3 O.R. 829, 29 D.L.R. (3d) 662.

As noted, judicial opinion in Canada is divided on the question of whether exemplary damages can be awarded in cases of equitable wrong-doing such as breach of fiduciary obligation. A similar division of opinion is to be found in American jurisprudence.[28] There would thus be some advantage, in our view, in adopting a clear rule that would bring an end to the present state of uncertainty. For the reasons discussed below, we have concluded that the preferable rule would be one that recognizes the possibility of granting punitive damages in these cases.

There appear to be essentially two arguments against the awarding of punitive damages in equity. The first rests on the historical division between common law and equity and the second on a view that equitable remedies already contain within them sufficient capacity to be punitive. With respect to the first argument, it is no doubt true that the remedy of exemplary damages was developed and embraced only by the courts of common law. In contemporary circumstances, however, this historical fact cannot, *per se*, justify a continuing limitation of the jurisdiction of our courts in cases of equitable wrong-doing. In cases of common law fraud, for example, the tortfeasor may be held liable for compensatory damages in tort or, alternatively, may be required in a restitution claim to disgorge the profits resulting from the fraudulent activity. The Commission has already recommended that punitive damages should be available in such cases.[29] The courts, in our view, should have a similar capacity in cases of equitable fraud. We have concluded that an advertent and exceptional breach of fiduciary obligation is as worthy of punishment as conduct that may constitute a fraud at common law. Thus, for these purposes, the distinction between common law and equity is rather artificial.

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[24] For a criticism of this conclusion see Vaver, "Civil Liability for Taking or Using Trade Secrets in Canada" (1981), 5 Can. Bus. L. J. 253, at 291-96, and Waddams, *The Law of Damages* (1983), para. 1001, at 576, where the author suggests that "[t]his conclusion has been criticized persuasively . . . on the ground that the availability of exemplary damages should not be determined by classification of the wrong as a common law tort or as a breach of an equitable obligation".

[25] *Herring v. Worobel* (1988), 67 O.R. (2d) 151 (H.C.J.). See, also, *Guertin v. Royal Bank of Canada* (1983), 43 O.R. (2d) 363, 1 D.L.R. (4th) 68 (H.C.J.), aff'd (1984), 47 O.R. (2d) 799*n*, 12 D.L.R. (4th) 640*n* (C.A.).

[26] See, for example, *Schauenburg Industries Ltd. v. Borowski* (1979), 25 O.R. (2d) 737, 101 D.L.R. (3d) 701 (H.C.J.); *G.E.Cox Ltd. v. Adams* (1979), 26 N.B.R. (2d) 49, 55 A.P.R. 49 (S.C., App. Div.), supplementary reasons at 26 N.B.R. (2d) 628, 55 A.P.R. 628; *57134 Manitoba Ltd. v. Palmer* (1985), 65 B.C.L.R. 355, 8 C.C.E.L. 282 (S.C.); and *Huff v. Price*, unreported (December 3, 1990, B.C.C.A.).

[27] See Vaver, *supra*, note 24, at 294.

[28] References to American sources are collected in Gummow, "Compensation for Breach of Fiduciary Duty" in Youdan (ed.), *Equity, Fiduciaries and Trust* (1989) 57 at 79-80.

The distinction between common law and equity in this context is also uncertain in application. It is unclear, for example, whether the cause of action for injuries resulting from a breach of a duty of confidence would be considered to be a common law or equitable claim for these purposes. In *Lac Minerals Ltd. v. International Corona Resources Ltd.*[30] the Supreme Court of Canada noted that this cause of action has both common law and equitable origins. Further, if our courts should recognize in the future new causes of action, such as invasion of privacy, it would be undesirable, in our view, to require that such claims be characterized as being, by their nature, more like common law claims than equity claims for the purpose of determining whether an award of punitive damages is potentially available. In *Lac* itself, of course, the Supreme Court of Canada took the view that the equitable remedy of constructive trust ought to be available in cases of breach of confidence, thus favouring greater remedial flexibility than that found in the traditional jurisprudence on this point. Restricting punitive damages to the context of common law claims would constitute a move in the opposite direction.

The second argument against the extension of punitive damages into the equity context is that equitable remedies may already have a punitive dimension. The Commission also finds this argument unpersuasive. First, it is not abundantly clear that equitable remedies are "punitive" in the same sense as are the punitive damages discussed in this report. Thus, it is possible that those who take the view that equitable remedies may have a punitive effect may well be referring to the remedies of constructive trust and accounting of profits as they are made available in cases of breach of fiduciary duty. Such remedies, however, provide relief in the form of disgorgement of profits. In this respect, they have their parallel in the common law claim for restitution on a waiver of tort theory. As noted above, the Commission has already recommended that punitive damages should be available in addition to a restitutionary claim for profits secured by tortious wrongdoing. As a matter of general principle, then, it would appear that the equitable remedies for breach of fiduciary obligation are not punitive in the sense intended in this report. Nonetheless, if in this or in other aspects of the law of equitable remedies there are dimensions that may properly be described as punitive, the Commission would still favour the adoption of a rule permitting the awarding of punitive damages in cases of equitable wrongdoing. If the granting of equitable remedies in a particular case did have a punitive effect, this is no doubt something a court would and should take into account in making a determination as to whether to make a further award of punitive damages. Accordingly, the Commission recommends that punitive damages should be available, in accordance with our earlier proposals, in cases of equitable wrongs.*

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[29] See *supra*, ch. 7.

[30] [1989] 2 S.C.R. 574, 61 D.L.R. (4th) 14.

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* Statement of Dissent by Commissioner Earl A. Cherniak, Q.C.

I cannot agree with the recommendation that punitive damages be available as a matter of course for purely equitable wrongs. The awarding of damages in equity outside of the strictures of *Lord Cairns Act* is of very recent origin, and the circumstances under which such damages can or should be awarded are still in the developmental stage. Our Courts award punitive damages only where the defendant's offensive conduct has been the cause of some compensable loss to the plaintiff; morally offensive conduct standing alone does not attract punitive damages: *Vorvis v. I.C.B.C.* (1989), 58 D.L.R. 4th 193 (S.C.C.), 206-7. When damages in equity are awarded, they are to be based on different principles than those of common law. They are based on the wrongdoers' gain, without regard to the plaintiff's loss, or indeed whether any loss at all was suffered by the plaintiff. It is clear as well that the scope of jurisdiction in equity to grant many forms of relief is wide indeed, but the wellspring of equitable jurisdiction is a previously existing relationship deserving of judicial protection between the plaintiff and the defendant in which the defendant has been abused: *Lac Minerals Ltd. v. Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.). The finding of a breach of trust itself may serve to stigmatize a defendant. In certain circumstances the operation of these equitable remedies can be seen to have a punitive effect, whether intended or not. Certainly they operate as a deterrent to offensive conduct. As MacKinnon A.C.J.O. states in *Lavigne v. Robern* (1984), 51 O.R. (2d) 60, at 63-4, where the defendant was obliged to disgorge the entirety of a secret profit notwithstanding the fact that, if he had acted honestly, he would have been entitled to 50% of the gain:

> In dealing with this problem I start from the simple basis that the defendant under the recited circumstances must not be allowed to profit from his own wrongdoing. This may be an adoption of a penal rule of equity but it is warranted in this case: *Peso Silver Mines Ltd. v. Cropper* (1965), 56 D.L.R. (2d) 117 at p. 154, 54 W.W.R. 329; Jones, "Unjust Enrichment and the Fiduciary's Duty of Loyalty", 84 L.Q.R. 472 (1968). One can assume that a minimum sale price for the company was $67,300. The partners received $17,300 which was divided in accordance with their shareholding agreement. If the defendant had openly and honestly negotiated a sale for $67,300 he would have received 50% of the $67,300. This is precisely the amount he receives under the judgment now appealed.
>
> In my view this is an inappropriate disposition of the counterclaim. If it is accepted that the defendant should not profit by his wrongdoing, there is no penal aspect to the present result. As the matter now stands he receives precisely what he would have received if he had acted honestly and brought his associates into the picture to share in the genuine sale price. The result provides no disincentive. In such cases, if the judgment were to stand, the fiduciary could breach his trust hoping to hide the breach and retain the secret profit, and if he failed to do so, he could still retain his 50% (or whatever his percentage interest in the company was) of the secret profit.
>
> This is not a case where economic incentive is to be encouraged and where, as Professor Ernest Weinrib puts it in his article entitled, "The Fiduciary Obligation", 25 University of Toronto Law Journal 1 (1975): ". . . . the courts must navigate a delicate course between the encouragement of co-operative mechanisms of business enterprise and the encouragement of profit-making by individual entrepreneurs" (p. 18). In my view the navigation markers are plain in the instant case. The defendant's conduct as entrepreneur is not the kind that should be encouraged.

This passage makes it clear that where appropriate, equity can be used to achieve the same ends as punitive damages at common law.

The issue for the Commission is whether there should be a recommendation that punitive damages be available as a remedy for an equitable wrong, where the conduct is sufficiently outrageous, in addition to the wide range of existing equitable remedies. I am not satisfied that the case for reform has been made. In many such cases the conduct relied upon will justify punitive damages based on a common law tort or breach of contract concurrent with the equitable wrong – in other words, an independent cause of action as contemplated in recent jurisprudence. In such cases I can see no problem with the awarding of punitive damages in addition to other available remedies, whether common law or equitable, as long as there is no duplication of damages. An instructive example of this is *Wonsch Construction Co. v. Danzig Enterprises Ltd.* (1990), 1 O.R. (3d) 382 (C.A.) in which punitive damages were awarded in trespass for high-handed conduct in enforcing a debenture against a former partner in circumstances where the acquisition of the debenture arose from a breach of fiduciary duty. To have also awarded punitive damages for the breach of fiduciary duty would have been excessive since the Court fashioned an equitable remedy which denied any gain to the wrongdoer as a result of the fiduciary breach. Where the conduct sounds entirely in what has heretofore been considered purely equitable misconduct, I see no need to extend what is essentially a common law damage concept to the already wide powers available to a court exercising equitable jurisdiction. I prefer that this issue be considered on a case by case basis, whereby it can be determined if there is in fact a lacuna in the law such that there is a need to award punitive damages, in order to vindicate the law and prevent injustice, on the principles that underlie the punitive damage concepts that we have recommended throughout this report.

I recognize that there are some developing areas of the law that blur the distinction between law and equity – breach of confidence is the one that springs to mind. In such cases courts may well have to determine whether the theoretical basis of the claim is tortious or equitable, to determine the issue of punitive damages. I do not think this is necessarily a bad thing. We have not yet reached the stage that the full range of equitable remedies is available for common law concepts such as tort or breach of contract, nor should we in my view. Certainly, the law of punitive damages is not the place to begin such a fusion.

CHAPTER 9

PUBLIC AUTHORITIES

1. INTRODUCTION

In this chapter the Commission considers the rules governing the award of punitive damages against public authority defendants, and addresses the question whether, in this context, special considerations might justify the creation of rules that differ from those that are applied to private individuals. The case in favour of punitive damages is a variation of the basic case considered earlier in this report.[1] Most of the difficulties, in the present context, derive from objections made to punishing public authorities, and concerns about the effectiveness such awards might have in deterring such authorities. The discussion is limited to punitive damages. There are no particular problems, in our view, with holding public authorities liable for compensatory aggravated damages,[2] and we are unaware of any having been raised in any other jurisdiction. The Commission recommends, therefore, that our earlier proposal respecting damages for injuries to pride and dignity,[3] should apply to actions against public authorities.

A public authority may be defined as an authority created by statute, and thereby empowered or obligated to perform functions in the public interest.[4] Any special issues concerning punitive damages against public authorities arise primarily as a result of the public purpose of the authority, and the fact of public funding.[5] In *Cassell & Co. Ltd. v. Broome*,[6] Lord Hailsham indicated that government servants in the strict sense, police officers, and local and other officials purporting to exercise lawful authority, would be included in this category, which is given special treatment in England. The issue has not been considered expressly in Canada, probably because it is unclear whether any special rules for punitive damages apply to public authorities.

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[1] *Supra*, ch. 6.

[2] This is so either with the common law of aggravated damages, or with the expanded remedy recommended *supra*, ch. 5.

[3] *Supra*, ch. 5.

[4] Feldthusen, *Economic Negligence*[:] *The Recovery of Pure Economic Loss* (2d ed., 1989), at 281.

[5] Other relevant considerations include political accountability, and the exercise of policy and decision-making discretion.

[6] [1972] A.C. 1027, at 1077-78, [1972] 2 W.L.R. 645, at 675 (H.L.) (subsequent references are to [1972] A.C.).

There are two different ways in which a public authority, as opposed to an employee of the authority, might be held liable for punitive damages. First, the authority may be independently liable, for example, where the managing official or group of officials authorizes the commission of a tort. The "complicity" tests for vicarious liability[7] are really variations of this mode. Usually, the act is one that would be tortious if it were committed by a private individual. Trespass, in the absence of legal authority, is a common example in the Canadian cases.[8] An authority may also be held independently liable in tort for the wrongful failure to fulfil its statutory obligations in circumstances in which it would be anomalous to speak of conduct that would be actionable if committed by a private individual.[9] Second, the public authority, like any other employer, may be exposed to vicarious liability for punitive damages incurred by an employee acting in the course of employment.[10] The case for and against punitive damages differs somewhat depending on whether the liability sought to be imposed is independent or vicarious.

The law, and the underlying policy, differs considerably amongst different jurisdictions. The law in England and Canada, in different ways, views wrongs committed by public authorities as being more readily deserving of punishment than wrongs committed by private individuals. The law in these jurisdictions is summarized immediately below. In the United States, both the courts and legislatures are inclined either to immunize public authorities from punitive damages, or to apply the law more restrictively to them.[11]

2. THE PRESENT LAW

(a) ENGLAND

In *Rookes v. Barnard*,[12] Lord Devlin held that exemplary damages could be awarded in England in only two categories of common law case. The first was the tort for profit category. The second category, "oppressive, arbitrary or unconstitutional action by the servants of the government",[13] seemed to enjoy Lord Devlin's principled support. It is not clear from his decision whether he regarded public authorities as a special category of defendants to which liability for exemplary damages for exceptional conduct could attach, much as it can to any defendant in Canada. It may be that "oppressive, arbitrary or unconstitutional action" was intended as a different standard for exemplary damages.

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[7] Discussed *supra*, ch. 6, sec. 4(a)(i).

[8] See, for example, *Sulisz v. Flin Flon*, [1979] 3 W.W.R. 728, 9 C.C.L.T. 89 (Man. Q.B.); *Kitchen v. Harbour Grace Town Council* (1983), 43 Nfld. & P.E.I.R. 146, 127 A.P.R. 146 (Nfld. C.A.); *Witherow v. Moose Range* (1985), 41 Sask. R. 194 (Q.B.); and *Johnson v. British Columbia Hydro and Power Authority* (1981), 27 B.C.L.R. 50, 123 D.L.R. (3d) 340 (S.C.).

[9] This is a complex, and not clearly articulated principle. See, generally, Feldthusen, *supra*, note 4, ch. 6. For an example of such a wrong culminating in an award of punitive damages, see *Barthropp v. West Vancouver* (1979), 17 B.C.L.R. 202 (S.C.). In *Cassell & Co. Ltd. v. Broome*, *supra*, note 6, at 1128, Lord Diplock suggests that exemplary damages against public authorities should be limited to cases where the conduct would be actionable if committed by a private citizen. This makes sense when the issue is vicarious, not independent, liability. The English cases have not considered independent liability.

[10] For a discussion of the liability of the Crown in tort see Ontario Law Reform Commission, *Report on the Liability of the Crown* (1989), ch. 2.

[11] See *infra*, this ch., sec. 3(b).

[12] [1964] A.C. 1129, [1964] 2 W.L.R. 269 (H.L.) (subsequent references are to [1964] A.C.).

There has been little subsequent amplification regarding this second category by the English courts. In *Cassell & Co. Ltd. v. Broome*,[14] Lord Diplock suggested that the case of *Huckle v. Money*[15] was authority for an award of exemplary damages in the absence of advertent wrong or exceptional conduct. Presumably, he endorsed such a rule in English law, but this is not developed. Lord Kilbrandon saw *Huckle v. Money* as an example of "an outrageous excess of official authority".[16] If one focuses on the act of the servant, as the English cases have to date, Lord Diplock's characterization is correct. On the other hand, if one focuses on the public authority itself, Lord Kilbrandon's characterization is accurate. In Canada, the action would probably be brought against the authority, not the official who executed the order, and the case would be unexceptional.

In *Holden v. Chief Constable of Lancashire*,[17] the Court of Appeal held that oppressive, arbitrary, and unconstitutional conduct were three distinct conditions, any one of which would be sufficient to bring the conduct within Lord Devlin's second category. Thus, the court held that the plaintiff need not prove oppressive or arbitrary conduct, in addition to unconstitutional behaviour. No amplification of the meaning of the terms "oppressive" or "arbitrary" was given by the court. It did indicate, however, that other "improper" unconstitutional conduct could support an award of exemplary damages,[18] although the court gave little guidance as to what such conduct might be. Thus, it is possible that any unconstitutional behaviour might support an award of punitive damages, in cases in which the act would be tortious if committed by a private individual. In cases of unique public authority wrongs, the act would have to be knowingly *ultra vires* to be tortious in the first instance,[19] but that might be sufficient also to support an award of punitive damages. This seems a surprising outcome in a jurisdiction in which the courts have expressed such serious reservations about punitive damages.

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[13] *Ibid.*, at 1226.

[14] *Supra*, note 6, at 1128-29.

[15] (1763), 95 E.R. 768 (K.B.).

[16] *Cassell & Co. Ltd. v. Broome*, *supra*, note 6, at 1134.

[17] [1986] 3 All E.R. 836 (C.A.).

[18] *Ibid.*, at 841.

[19] Feldthusen, *supra*, note 4.

(b) CANADA

In Canada, there are numerous instances of awards of exemplary damages against public authorities. Sometimes these are justified with reference to the special category in *Rookes v. Barnard*;[20] at other times they appear to result from the application of the same tests that govern private individuals, based on exceptional conduct. It is therefore unclear in Canada whether public authorities are governed by special rules, or whether they merely present a variation of the general rule. In general, it appears that the courts regard the public status of the defendant as an aggravating factor, rather than as a mitigating factor. However, with one exception,[21] the courts have not identified oppressive, arbitrary, or unconstitutional, behaviour as distinct bases for liability.

In most instances, awards of exemplary damages have been imposed in the Canadian cases where the public authority knew or ought to have known that its conduct was *ultra vires*. The nature of the conduct has been described in the following terms: a "flagrant abuse of power";[22] "without vestige of supporting legality";[23] "beyond mere inadvertence, mistake, oversight, or misunderstanding";[24] and "ignoring the law whose authoritative interpretation was clearly signalled to them".[25]

Moreover, it would appear that advertent *ultra vires* conduct, culminating in a tort, is seen as a sufficient basis for exemplary damages.[26] In such a case, either further exceptional conduct is not required, or advertent illegality itself constitutes oppressive, arbitrary, or otherwise exceptional conduct. In either case, the law appears to treat public authorities differently from private individuals. Private defendants must act advertently wrongfully, and also in an exceptional manner.

3. INDEPENDENT LIABILITY

(a) THE CASE FOR MORE EXPANSIVE PRINCIPLES

In *Rookes v. Barnard*, when isolating servants of the government for special consideration, Lord Devlin said: "the servants of the government are also the servants of the people and the use of their power must always be subordinate to their duty of service".[27] The critical factor appears to be one of public trust. Public authorities are given exceptional power to commit acts that would be tortious if committed by private individuals. Their part of the bargain is to act lawfully and in the public interest. They, more than other defendants, are reasonably expected to know and respect the legal limits to their exceptional powers. When individuals feel they have been treated unlawfully by public authorities, they often believe, with some justification, that they are powerless to react. The criminal law is unsuited to deal with much unlawful behaviour by public authorities, where the wrongdoer cannot be readily identified. Moreover, compensatory damages in tort will often prove to be an inadequate sanction.[28]

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[20] See, for example, *Gershman v. Manitoba Vegetable Producers' Marketing Board* (1976), 69 D.L.R. (3d) 114, [1976] 4 W.W.R. 406 (Man. C.A.); *Sulisz v. Flin Flon, supra*, note 8; and *Witherow v. Moose Range, supra*, note 8.

[21] *LeBar v. Canada* (1988), 90 N.R. 5, at 14, 22 F.T.R. 160n (F.C.A.).

[22] *Gershman v. Manitoba Vegetable Producers' Marketing Board, supra*, note 20, at 413.

[23] *Sulisz v. Flin Flon, supra*, note 8, at 729.

[24] *Ibid.*, at 741.

[25] *LeBar v. Canada*, [1987] 1 F.C. 585, at 609, 8 F.T.R. 250, at 265 (F.T.D.), aff'd *supra*, note 21.

[26] In *LeBar v. Canada, supra*, note 21, the court expressly stated that malice is not required in a case within this category.

In addition, the symbolic case for punitive damages against public authorities who advertently exceed their lawful authority must be considered.[29] One of the most important precepts in our society is that no one is above the law, and in particular, that we are governed according to law. The courts play an important role in providing the public affirmation society requires of fundamental precepts. Even if it were certain therefore that punitive damages awards would not deter public authorities from advertent illegality, they might be supported for their symbolic purpose.

Prima facie, we believe that these reasons are sufficient to justify an award of punitive damages against public authorities who advertently exceed their lawful authority and injure another tortiously.[30]

The further question is whether punitive damages ought to be awarded where the authority acts without lawful justification and thereby commits a tort, but does not exceed its jurisdiction advertently. Something of this nature seems to have been contemplated in *Holden v. Chief Constable of Lancashire*,[31] but the case is not enlightening on this point. On retributive grounds, it is illogical to punish someone who reasonably believes she is acting lawfully. However, exemplary damages might encourage defendants to take more care to act lawfully, and they might serve a symbolic purpose. Often these can be accomplished by compensatory damages. Where they cannot, exemplary damages might be appropriate.

One Canadian case on point is *Crossman v. The Queen*.[32] In that case, a police officer was found to have violated the plaintiff's rights under section

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[27] *Supra*, note 12, at 1226.

[28] See *infra*, note 32, and accompanying text.

[29] See *supra*, ch. 6, sec. 2(a).

[30] The issues of whether the correct party is punished, in the correct amount, and whether deterrence can be effected by an award of exemplary damages against a public authority will be considered *infra*, this ch., sec. 3(b).

[31] *Supra*, note 17.

[32] [1984] 1 F.C. 681, 9 D.L.R. (4th) 588 (F.C.T.D.).

10(b) of the *Canadian Charter of Rights and Freedoms*.[33] There is no indication that this was advertent, in the sense that the officer knew or ought to have known this was a violation. Nor was there any other conduct that could be described as exceptional. The court awarded $500 punitive damages under section 24(1) of the Charter. It did so because the plaintiff had suffered no compensable loss, and without such an award the unconstitutional conduct would not be punished. Although Charter remedies are beyond the scope of this report, it would be possible to use punitive damages to punish *ultra vires* conduct, other than Charter breaches, where there is no other sanction. If the occasional case outside the Charter realm were to adopt this approach, we do not believe it would be objectionable. The modest fine in *Crossman v. The Queen* is not likely to generate a flood of litigation. On the other hand, we do not recommend that the courts should be authorized by legislation to award punitive damages for conduct that is not advertently unlawful.

(b) THE CASE FOR MORE RESTRICTIVE PRINCIPLES

If the trend in England, and perhaps in Canada, has been to expose public authorities more readily to punitive damages, there has been substantial reluctance to extend the general law of punitive damages to public authorities in the United States. In part, this may be explained by the doctrine of sovereign immunity,[34] but the courts have also given a number of substantive reasons for limiting punitive damages claims against public authorities.[35]

There are numerous Canadian cases that hold the public authority itself, as opposed to the individual employee, liable for punitive damages.[36] A legitimate concern with holding public authorities liable, not only for punitive damages, but for tort generally, is that the fear of liability will influence public policy determinations inappropriately.[37]

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[33] Being Part I of the *Constitution Act, 1982*, which is Schedule B of the *Canada Act 1982*, c. 11 (U.K.), as am. by the Constitution Amendment Proclamation, 1983, SI/84-102, effective June 21, 1984.

[34] Sovereign immunity remains the rule as to the liability of governments and other public bodies in the United States. Statutes waiving the immunity are given a restrictive interpretation. While the federal government in the United States has abandoned the concept of sovereign immunity, the Federal Tort Claims Act, 28 U.S.C. §§ 2671 *et seq.* protects the federal government from an award of punitive damages.

[35] The Supreme Court of the United States summarized the different rationales in *Newport v. Fact Concerts, Inc.*, 453 U.S. 247 (1981).

[36] See, for example, *Gershman v. Manitoba Vegetable Producers' Marketing Board*, *supra*, note 20; *Sulisz v. Flin Flon*, *supra*, note 8; *Johnson v. British Columbia Hydro and Power Authority*, *supra*, note 8; and *Kitchen v. Harbour Grace Town Council*, *supra*, note 8.

[37] See Davey, "The New Administrative Law: A Commentary on Cost" (1983), 42 Austl. J. Pub. Admin. 261, cited in Bayne, "Administrative Law" (1988), 62 Austl. L.J. 1040, at 1045: "[i]f people are put in the stocks every time something goes wrong, their aim in life becomes staying out of the stocks and avoiding public criticism, not winning prizes for innovative management". See, also, generally, *supra*, note 9.

Another objection to holding public authorities liable for punitive damages is that the notion of imposing punishment upon a legal abstraction is illogical. If the rationale were purely punitive, and if it were accurate to assume that no sanction would filter down indirectly to the individuals responsible, this would be a forceful objection. However, the force of the objection is diminished if an award of punitive damages made against a public authority has the effect of deterring unlawful conduct. Indeed, higher awards for deterrence purposes might be justified against a legal abstraction, since such defendants are not constrained by the limits imposed by retributive justice. Moreover, the symbolic function of punitive damages may be effected equally well, or better, against an abstraction. In addition, it seems reasonable to assume that the individuals responsible for the authority's punitive liability will be sanctioned occasionally by someone in higher authority. This may be the only way to identify and punish such individuals effectively.

It might also be objected that the burden of an award of punitive damages made against a public authority will fall, ultimately, on the innocent taxpayers, either in the form of reduced services or higher taxes. Taxpayers, unlike corporate shareholders, cannot terminate their relationship with the defendant, so this is a matter of legitimate concern. In the United States, where (1) awards are typically made by juries; (2) quantum is unbounded by retributive principles; and (3) the wealth of the defendant is systematically relevant, this may be a practical problem. As in other areas, the basis of the concern expressed in the United States appears to rest less on an objection to punitive damages in principle, than on an objection to the potentially huge awards possible there. In Ontario, jury trials are not permitted where relief is sought against a municipality,[38] one of the most common public authority defendants. Moreover, we have already made a number of recommendations respecting the quantification of an award of punitive damages[39] that render it extremely unlikely that an award of such damages would be made that would have a substantial effect on the budget of most public authorities. There is very little risk, therefore, that such an award would impose real hardship on the taxpayers. This is confirmed by the relatively small awards made in cases against public authorities to date. Such awards are usually insufficient to justify the cost of litigating the issue.[40]

It might be suggested that the public bureaucracy is not deterred, or is not deterred in the same way, as private enterprise, by the imposition of financial penalties. Certainly the budget of the provincial government or, perhaps, even a municipal government, is not subject to any meaningful constraint in this context. On the other hand, agencies, boards and other entities that are funded by the government might be deterred by the prospect of having to request funding for punitive awards. Admittedly, the internal structure of many public authorities may not be conducive to effective deterrence. However, this argues in favour of imposing liability on both the public authority itself and on the individuals responsible, not in favour of immunizing the authority. If punitive awards were restricted to the individual bureaucrats who commit the wrongful act, a great deal of unlawful behaviour would remain unpunished, and punitive damages would be imposed primarily on lower level employees, that is, those who are likely to be the least responsible and the least able to pay.

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[38] *Courts of Justice Act, 1984*, S.O. 1984, c. 11, s. 121(2)12, as am. by S.O. 1989, c. 55, s. 20(2).

[39] See *supra*, ch. 6, sec. 3(d).

[40] There have been 3 substantial awards: $35,000 in *Gershman v. Manitoba Vegetable Producers' Marketing Board*, *supra*, note 20; $11,000 in *Sulisz v. Flin Flon*, *supra*, note 8; and $10,000 in *LeBar v. Canada*, *supra*, note 21. On the other hand, there have been 2 awards of only $500 (see *Kitchen v. Harbour Grace Town Council*, *supra*, note 8, and *Crossman v. The Queen*, *supra*, note 32; 1 of $1,500 (see *Lord v. Allison* (1986), 3 B.C.L.R. (2d) 300 (S.C.)); and 1 of $2,000 (see *Witherow v. Moose Range*, *supra*, note 8).

(c) Conclusions

The Commission has concluded that punitive damages awarded for the purpose of punishing a public authority would likely be relatively ineffectual, but they would also be relatively harmless. Moreover, they would probably be less effective as a deterrent than they are against private enterprise, although they would not be necessarily completely ineffectual. However, because punitive awards are often accompanied by powerful judicial language, and because they are rare, they are frequently reported in the media. This may serve a useful deterrence function. It also serves a useful symbolic function. Moreover, immunizing public authorities from punitive damages would be objectionable from a symbolic point of view. The Commission recommends, therefore, that public authorities should remain independently liable for punitive damages, in accordance with our recommendations made in respect of punitive damages generally, where they advertently exceed their legal authority and injure another tortiously. Accordingly, exceptional conduct on the part of the defendant should not be required.

4. VICARIOUS LIABILITY

Finally, there is the issue of vicarious liability, on the principle of *respondeat superior*. Canadian courts routinely hold public authorities vicariously liable for punitive damages assessed against their employees, just as they do with private defendants. The basic objection, in the present context as in others, is with punishing a truly innocent defendant. The concerns unique to public authorities are the same as those considered above.

Vicarious liability for compensatory damages serves at least two purposes. First, it helps ensure that there is a solvent defendant available to pay the compensatory damages, often a defendant who may spread the loss efficiently. This purpose is irrelevant with respect to punitive damages. Second, it induces the employer to take appropriate measures to deter employee misconduct.[41] While there is a strong case for deterrence here, the efficacy of punitive damages as a deterrent is uncertain. Therefore, if the authority was truly innocent, a legitimate argument could be made against vicarious liability. On the other hand, while punitive damages might not deter unlawful conduct, their absence might encourage it.

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[41] Posner, "A Theory of Negligence" (1972), 1 J. Leg. Stud. 29, at 38.

The problem is in determining the circumstances under which it would be unjust to hold the authority vicariously liable. It seems unlikely that public employees would act wrongfully purely and always for personal motives. If complicity can be proved on the part of the public authority, the authority should be held vicariously liable. For example, a municipality should not be vicariously liable for punitive damages where a garbage collector batters a citizen during a dispute over trash collection. There is no reason, in these circumstances, to suppose that the authority tacitly approves of such conduct. As a practical matter, however, complicity may be difficult to establish.

Ultimately, the Commission has concluded that there is no compelling reason to distinguish public authorities from private employers for the purpose of vicarious liability.[42] We recommend, therefore, that our earlier proposal regarding vicarious liability, made in connection with punitive damages generally,[43] should apply to public authorities.

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[42] In our *Report on the Liability of the Crown, supra*, note 10, at 6, the Commission recommended that, subject to certain exceptions:

> [T]he privileges of the Crown in respect of civil liabilities and civil proceedings should be abolished, and the Crown and its servants and agents should be subject to all the civil liabilities and rules of procedure that are applicable to other persons who are of full age and capacity. . . . this recommendation is intended to apply with respect to all causes of action, including tort, contract, restitution and breach of trust.

[43] See *supra*, ch. 6, sec. 4(a)(i).

CHAPTER 10

EXTRA DAMAGES IN CONTRACT

I. INTRODUCTION

In this chapter we discuss three different types of claim for extra damages in contract. The first is a claim for damages for mental distress caused directly by the breach. The second is a claim for aggravated damages caused by the defendant's exceptional conduct. Aggravated damages are not necessarily, or even usually, related directly to the breach of contract *per se*. The third type of claim is a claim for exemplary or punitive damages. For convenience, we discuss damages for mental distress first, then punitive damages, and finally aggravated damages.

Prior to 1973, the courts in England and Canada did not recognize a claim for damages for mental distress, aggravated damages, or punitive damages, in an action for breach of contract. It was assumed that compensatory damages for mental distress, whether caused by the breach or by the mode of breach – aggravated damages – could not be recovered in contract.[1] In 1973, the English Court of Appeal held that damages for mental distress caused by a breach could be awarded in contract, provided that the contract test for remoteness was satisfied.[2] This line of authority has often been accepted, although not invariably, by the Ontario courts.[3] The mental distress cases were then relied upon to support the different case for aggravated damages in contract caused by the defendant's reprehensible conduct. In most cases, it appears that the courts did not consider the conceptual difference between these two different types of extra damages.[4]

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[1] The case generally relied upon for this proposition was *Addis v. Gramophone Co. Ltd.*, [1909] A.C. 488, [1908-10] All E.R. Rep. 1 (H.L.).

[2] *Jarvis v. Swans Tours Ltd.*, [1973] 1 All E.R. 71 (C.A.). There is some dispute as to whether the proper test for remoteness is foreseeability, as it is in the case of tort, or whether it is something more stringent. See the minority judgment in *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085, 58 D.L.R. (4th) 193 (subsequent references are to 58 D.L.R. (4th)).

[3] It is not always clear whether the cases endorse or reject damages for mental suffering caused by the breach, aggravated damages, punitive damages, or some combination of these. This is true of many of the cases cited in both judgments in *Vorvis v. Insurance Corporation of British Columbia, supra*, note 2. See, especially, *Brown v. Waterloo Regional Board of Commissioners of Police* (1982), 37 O.R. (2d) 277, 136 D.L.R. (3d) 49 (H.C.J.); varied on appeal (1983), 43 O.R. (2d) 113, 150 D.L.R. (3d) 729 (Ont. C.A.). For clear examples of cases that have allowed damages for mental distress resulting from a breach of contract, but not aggravated or punitive damages, see *Antonaros v. SNC Inc.* (1984), 6 C.C.E.L. 264 (Ont. H.C.J.), and *Lightburn v. Mid Island Consumer Services Co-Operative* (1984), 4 C.C.E.L. 263 (B.C. Co. Ct.). See, also, *Tippett v. International Typographical Union Local 226* (1976), 71 D.L.R. (3d) 146, [1976] 4 W.W.R. 460 (B.C.S.C.).

Historically, punitive damages[5] were also not available in contract.[6] This began to change simultaneously with the recognition of claims for aggravated damages. Punitive damages for breach of a collective agreement were awarded in New Brunswick in 1976,[7] and for negligent breach of contract in Alberta in 1978.[8] In Ontario, the possibility of punitive damages in contract was recognized in 1978,[9] and the first award in Ontario, made clearly for the purpose of punishment, was in 1984.[10] Unfortunately, however, the courts frequently did not distinguish between awards of punitive damages, aggravated damages, or damages for mental distress.[11]

By 1989, a difference of opinion had developed among, and within, the different jurisdictions in Canada as to whether aggravated or punitive damages could be recovered in an action for breach of contract. Increasingly, the Ontario courts were acknowledging that such awards could be granted in an appropriate case, although actual awards of aggravated or punitive damages were not common.

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[4] Aggravated damages are caused by the motive for, or mode of, the breach, and are not necessarily connected directly to the breach itself. See *infra*, this ch., sec. 4.

[5] The majority in *Vorvis v. Insurance Corporation of British Columbia, supra*, note 2, used the term "punitive", and accepted the distinction between aggravated damages and punitive damages established in *Rookes v. Barnard*, [1964] A.C. 1129, [1964] 2 W.L.R. 269 (H.L.) (subsequent reference is to [1964] A.C.).

[6] *Guildford v. Anglo-French Steamship Co.* (1884), 9 S.C.R. 303, and *Dobson v. Winton and Robbins Ltd.*, [1959] S.C.R. 775, 20 D.L.R. (2d) 164. See, also, *Addis v. Gramophone Co., supra*, note 1. Only two decisions in *Addis* addressed the question of punitive damages. Lord Atkinson would have precluded such damages in contract, and Lord Collins, in dissent, would have left the issue to the jury.

[7] *New Brunswick Electrical Power Commission v. International Brotherhood of Electrical Workers Local 1733* (1978), 22 N.B.R. (2d) 364, 39 A.P.R. 364 (S.C.).

[8] *Rowland's Transport Ltd. v. Nasby Sales & Services Ltd.* (1978), 16 A.R. 192 (S.C.T.D.).

[9] *Delmotte v. John Labatt Ltd.* (1978), 22 O.R. (2d) 90, 92 D.L.R. (3d) 259 (H.C.J.), possibly only aggravated damages in issue. See, also, *Cornell v. Pfizer C. & G. Inc.* (1981), 23 C.P.C. 286, 81 C.L.L.C. 14,103 (Ont. H.C.J.); *Brown v. Waterloo Regional Board of Commissioners of Police, supra*, note 3; *Centennial Centre of Science and Technology v. VS Services Ltd.* (1982), 40 O.R. (2d) 253, 31 C.P.C. 97 (H.C.J); and *Jennett v. Federal Insurance Co.* (1976), 13 O.R. (2d) 617, 72 D.L.R. (3d) 20 (H.C.J.). *Contra*, *Cardinal Construction Ltd. v. The Queen in right of Ontario* (1981), 32 O.R. (2d) 575, 122 D.L.R. (3d) 703 (H.C.J.), aff'd (1981), 38 O.R. (2d) 161, 128 D.L.R. (3d) 662 (C.A.). Additional cases are cited by the minority in *Vorvis v. Insurance Corporation of British Columbia, supra*, note 2.

[10] *Pilato v. Hamilton Place Convention Centre Inc.* (1984), 45 O.R. (2d) 652 (H.C.J.). See, also, *Nantel v. Parisien* (1981), 18 C.C.L.T. 79, 22 R.P.R. 1 (Ont. H.C.J.).

[11] An explicit endorsement of aggravated damages and rejection of punitive damages appears in *Pilon v. Peugeot Canada Ltd.* (1980), 29 O.R. (2d) 711, 114 D.L.R. (3d) 378 (H.C.J.). Again the distinction between mental distress and aggravated damages is not always clear in the cases.

In 1989, the Supreme Court of Canada gave its decision in *Vorvis v. Insurance Corporation of British Columbia*,[12] a case involving an action for wrongful dismissal. In that case, the court dealt expressly with all three types of claim for extra damages in contract. With respect to damages for mental distress that flowed from the breach, the full court endorsed the view that non-pecuniary damages in the nature of mental distress may be recovered in contract, if the damage was caused by the breach, and was not too remote. The majority added, however, that damages for mental distress could not be recovered in an action for wrongful dismissal. The majority offered few substantive reasons for denying damages for mental distress in cases of wrongful dismissal, relying primarily on the court's brief comments on the issue in *Peso Silver Mines Ltd. v. Cropper*.[13] In essence, the court upheld the common law position that employment contracts could be terminated by due notice. Therefore, the damages that were recoverable were those, and only those, that arose from the failure to give such notice. The minority, on the other hand, would have permitted damages for mental distress in wrongful dismissal cases as a matter of principle, but declined to award them in the particular case.

With respect to aggravated damages caused by the defendant's reprehensible conduct, the majority denied that such damages caused by conduct, and not by breach, could be awarded in wrongful dismissal cases. Although it is unclear, it is probable that the majority rejected the possibility of aggravated damages in all actions for breach of contract. The majority held that aggravated damages not related directly to the breach could be recovered only if the damage flowed from an independently actionable wrong. The minority, by contrast, appeared to group the case for aggravated and punitive damages together, and endorsed both, under the heading of punitive damages, based on the reprehensible conduct of the defendant.

Finally, with respect to punitive damages, the majority held that such damages could be awarded in contract only if the conduct complained of constituted an independently actionable wrong, and if it was deserving of punishment due to its "harsh, vindictive, reprehensible and malicious nature".[14] The majority held that the claim failed on both grounds. The minority endorsed punitive damages for reprehensible conduct in the case of contract, as in the case of tort. While the minority upheld an award of punitive damages in the case, much of that award might be classified better as aggravated damages.

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[12] *Supra*, note 2.

[13] [1966] S.C.R. 673, 56 W.W.R. 641.

[14] *Supra*, note 2, at 208.

Although actual awards for mental distress, aggravated damages and punitive damages have been few, such damages have been claimed in ten to fifteen percent of all actions in contract in Ontario in recent years. In York County in 1987, forty-three percent of all actions for wrongful dismissal contained a claim for exemplary damages. Contract claims generally constitute a significant proportion of the civil litigation in Ontario.[15] The incidence of awards for mental distress, aggravated damages and punitive damages in contract cases may change, at least in the short run, after the decision in *Vorvis*.

2. DAMAGES FOR MENTAL DISTRESS

Damages for mental distress are awarded for non-pecuniary loss in the nature of mental suffering caused by the breach of contract. Vacation or entertainment contracts are particularly good examples of the circumstances in which mental distress may be caused simply by virtue of the fact that the contract is breached. The very subject-matter of the bargain is non-pecuniary enjoyment. The case for compensation, in these circumstances, does not depend upon the egregiousness of the defendant's behaviour. When the contract is breached, the plaintiff is deprived of the subject-matter of the bargain.

Damages for mental distress should be distinguished from both aggravated damages and punitive damages, both of which focus on the defendant's objectionable conduct as well as the fact of the breach of contract. As such, discussion of the law relating to the recovery of damages for mental distress is only tangential to this report. We deal with it here briefly for two reasons.

First, as noted above, the courts have not always distinguished clearly between damages for mental distress and aggravated damages. The term "aggravated damages" is sometimes used to describe what might be characterized properly as damages for mental distress. Similarly, damages for mental distress are sometimes awarded in circumstances in which they would be characterized better as aggravated damages. In the tort context, the term "aggravated damages" refers to damages awarded to compensate the victim for injuries to pride and dignity occasioned by the tortfeasor's exceptional conduct.[16] It might be preferable to restrict the term "aggravated damages" in contract to a similar meaning, that is, damages for injury to pride and dignity inflicted by the breaching party's exceptional conduct.[17] Indeed, given

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[15] See *supra*, ch. 4.

[16] See *supra*, ch. 5.

[17] See *Bohemier v. Storwal International Inc.* (1982), 40 O.R. (2d) 264, at 272-73, 142 D.L.R. (3d) 8, at 17-18 (H.C.J.), varied (1983) 44 O.R. (2d) 361, 4 D.L.R. (4th) 383 (C.A.), leave to appeal to the S.C.C. refused [1984] 1 S.C.R. xiii, 3 C.C.E.L. 79, and *Ribeiro v. Canadian Imperial Bank of Commerce* (1989), 67 O.R. (2d) 385, at 427-33 (H.C.J.). In the latter case it was also held that damages for loss of reputation must be sought in defamation. See, also, *McMinn v. Oakville* (1978), 19 O.R. (2d) 366, 85 D.L.R. (3d) 131 (H.C.J.).

The distinction between damages for mental distress and aggravated damages is implicit the restrictions imposed by the Supreme Court of Canada on the recovery of aggravated damages in contract in *Vorvis v. Insurance Corporation of British Columbia*,[18] the distinction between aggravated damages and damages for mental distress may become crucial.

Second, in *Vorvis*, the majority approved damages for mental distress as a legitimate head of damages in contract generally, but, as we indicated earlier, held that such damages were not recoverable in actions for wrongful dismissal. The judgment may be viewed as concerning the substance of wrongful dismissal law, from which the remedial conclusion naturally flowed.

While the substance of employment law is beyond the scope of this report, it is worth noting that there are trends in modern labour law rejecting this conception of the employment relationship.[19] These reflect the many non-economic aspects of the employment relationship, including the emotional well-being, prestige and social status that comes from employment. There is a certain and substantial non-economic benefit to having a job, and a certain and substantial non-economic loss in losing it unjustly. In effect, the decision in *Vorvis* denies legal recognition to the social and economic realities of modern employment.[20] This creates an imbalance of power when an employer seeks to dismiss an employee wrongfully, and this in turn becomes relevant to the case for aggravated and punitive damages in wrongful dismissal actions.

3. PUNITIVE DAMAGES FOR BREACH OF CONTRACT

(a) INTRODUCTION

A consideration of the remedies available for breach of contract cannot be isolated entirely from an inquiry into the nature of contractual obligations, the breach of which justifies the remedy. The answer to the question whether the law ought to allow either aggravated or punitive damages for breach of

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in both judgments in *Vorvis v. Insurance Corporation of British Columbia, supra*, note 2. The majority referred to both as aggravated damages, but drew the relevant distinction in its decision. The minority used the term "damages for mental suffering" to refer to what we refer to as damages for mental distress. Its consideration of aggravated damages was integrated with its discussion of punitive damages.

[18] *Supra*, note 2.

[19] See Venour, "Punitive Damages in Contract" (1988), 1 Can. J. L. and Jurisprudence 87, at 97-98. A different conception of the employment relationship provides a broader scope for extra damages. In *Cormier v. Hostess Food Products Ltd.* (1984), 52 N.B.R. (2d) 288, at 293, 137 A.P.R. 288, at 293 (Q.B.), the court awarded aggravated damages "where the method of termination is reminiscent of nineteenth century England at the start of the industrial revolution, and where the scenario would be proper subject matter for a tale by Charles Dickens". In *Tippett v. International Typographical Union Local 226, supra*, note 3, at 149, the court said union membership is "in a sense a social contract".

[20] The majority recognizes this in collective agreement settings, but does not consider whether a broader conception of the employment contract might be needed especially for unorganized labour. The minority judgment seems more sensitive to this in the abstract, but this is put into question by its refusal to recognize mental distress damages in the case.

contract depends, to a large extent, on how one views the nature of the obligation breached.

The competing views as to the nature of contractual obligations may be divided into two broad categories. First, is the more traditional view that a party has the right to breach the contract and choose to pay damages in lieu of rendering performance. This we refer to as the utilitarian view. With one possible exception,[21] under this view there exists no case for punitive damages in an action for breach of contract.

Second, is the emerging view that a contractual promise is an obligation that the promisor is morally bound to perform. The innocent party has a right to specific performance, not damages, if this is feasible. This we refer to as the moral view. Under this conception, deliberate breach of contract, without lawful excuse, might be regarded as absolutely normatively proscribed conduct, as is advertent tortious conduct. In accordance with this view, the arguments for punitive damages in contract bear some similarity to the arguments for punitive damages in tort.

(b) PUNITIVE DAMAGES UNDER THE UTILITARIAN VIEW

A useful point of departure is Oliver Wendell Holmes' frequently quoted observation:[22]

> The only universal consequence of a legally binding promise is that the law makes the promisor pay damages if the promised event does not come to pass. In every case it leaves him free from interference until the time for fulfillment has gone by, and therefore free to break his contract if he chooses.

This could be interpreted[23] to suggest that Holmes believed that a party to a contract had a right to breach the contract for whatever reason she desired. At the very least, it would appear that Holmes viewed a breach of contract as a morally neutral event.

A similar conceptualization of the nature of contractual obligations underlies the so-called doctrine of "efficient breach".[24] The right to breach is supported on the ground that it enables the breaching party to direct resources to more valuable uses, for example, to users who would pay more than the other party to the contract to be breached. Provided full compensation is paid, the aggrieved party gets what she bargained for, and resources move to the more highly valued use.

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[21] As we discuss *infra*, this ch., sec. 3(d)(iii), there might be an argument that, under the utilitarian view, punitive damages should be awarded for the failure to honour a known obligation to pay money, including the failure to pay damages upon deliberate breach.

[22] Holmes, *The Common Law* (1881), at 301.

[23] Holmes was a legal realist. For him, law consisted of predictions of what the courts would do. This quotation should be interpreted with that in mind. It is not a normative judgment about what contractual obligations ought to be.

[24] See, generally, Trakman, "Breach, Compensation and the Magic Carpet" (1989), presented and distributed at the International Symposium on the Law of Remedies, University of Windsor. This paper is to be published, as part of a collection of symposium papers, in Berryman (ed.), *Law of Remedies*, forthcoming from Carswell. See especially the authors cited in note 3. See, also, the authors cited by Venour, *supra*, note 19, at 97. Venour suggests

In contrast, no theory of tort law asserts that a defendant has the right to commit an advertent tort. Tortious conduct is absolutely normatively proscribed. Punitive damages are supported as a means to deter or punish advertent tortious conduct.[25] Under the utilitarian theory of contractual obligations, it is irrational to attempt to deter or punish the breaching party, since the act of breach is perceived as a neutral or efficient exercise of free choice.[26] No rational case exists, under this view, for punitive damages merely for deliberate breach of contract.

In tort, punitive damages may be awarded where the defendant's conduct is both advertent and "exceptional". It might be suggested that a similar rule should be applied in actions for breach of contract. Punitive damages could be awarded for deliberate breach effected in an exceptional manner, for example, for malicious motives. However, even this remains problematic under the utilitarian model. Earlier we suggested that advertent tortious conduct was a sufficient justification for retributive punishment, but that the additional requirement of exceptional conduct could be supported on other grounds.[27] Under the utilitarian model of contractual obligations, exceptional conduct would be the sole justification for punishment. In effect, this would amount to the creation of a new cause of action for exceptional conduct associated with contractual breach.

(c) PUNITIVE DAMAGES UNDER THE MORAL VIEW

At least three different views seem to be emerging in modern scholarship, each of which lends support to the case for punitive damages in certain cases of breach of contract. The first is a direct challenge to the doctrine of efficient breach. This view is not an element of the moral view itself; rather it allows the moral view to develop unhindered by arguments based on economic efficiency. The other two views assert that a contractual promise

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that efficiency analysis applies to contracts for goods and the like, but not to employment contracts. However, one can imagine, for example, an employer concluding that it would pay to terminate and compensate one employee in order to replace her with a second.

[25] Many argue that compensatory damages are awarded to deter tortious conduct. The obligation to pay compensatory damages in contract, under the view attributed to Holmes or the efficient breach theory, is merely one factor that the party takes into account in determining whether to exercise her right to breach.

[26] Some support for this is found in the majority's characterization of the obligations under a contract of employment in *Vorvis v. Insurance Corporation of British Columbia*, *supra*, note 2, at 204-05.

[27] See *supra*, ch. 6, sec. 2(c).

is a morally binding obligation, from which it follows that a principled case for punitive damages for deliberate breach may be developed in certain situations. Each of these three views is discussed, in turn, below.

The doctrine of efficient breach has been challenged on its own terms.[28] First, many dispute that the willingness, and therefore the ability, to pay more is a true indication of a "better" use of resources. Second, efficiency analysis does not entail necessarily that all the gains from efficient breach should go to the defendant. If specific performance were the universal remedy in contract, the parties would bargain with respect to compensation for breach, and would share the gains. Third, the transaction costs of securing the compensation owed for breach may well exceed the efficiency gains from the breach. Finally, legal compensation rarely addresses third party losses. There are social costs associated with the failure to pay compensation, especially, for example, where a business deliberately and systematically fails to compensate its clients or customers. If one assumes that breach is generally inefficient, then the case for exemplary damages in contract for the purpose of deterring deliberate breach would resemble closely the case for exemplary damages for the purpose of deterrence in tort.

The second challenge to the utilitarian view of contractual obligations approaches the issue from the remedial perspective. The prevailing view in the law of contract is that relief *in rem*, such as specific performance, is the exception, and should be given only where the plaintiff can demonstrate that monetary damages would be inadequate. Increasingly, this view is being challenged. Instead, it has been suggested that the plaintiff ought to be entitled to specific relief if that is the plaintiff's preference, and if such relief is feasible.[29] The practical difficulties associated with the remedy of specific performance need not concern us here. What is significant is the manner in which contractual obligations are conceptualized. The preference for specific relief denies that the defendant is free to breach and pay damages. Rather, it asserts that the plaintiff is entitled to performance.

Underlying a remedial preference for specific performance is the premise that advertent breach of contract, without lawful excuse, would be absolutely normatively proscribed conduct, as is advertent tortious conduct. In accordance with this view, advertent breach of contract, in itself, would be a sufficient justification for punishment. However, as in tort, there might be good reasons not to impose civil punishment except where the breach is also exceptional in manner or motive.

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[28] See Friedmann, "The Efficient Breach Fallacy" (1989), 18 J. Legal Stud. 1. See, also, *supra*, note 24.

[29] See Clark, "Rethinking the Role of Specific Relief in the Contractual Setting" (1989), presented and distributed at the International Symposium on the Law of Remedies, University of Windsor. This paper is to be published, as part of a collection of symposium papers, in Berryman, *supra*, note 24. See especially *ibid.*, at 8.

The third view is a logical extension of the second, in which the case for punitive damages is developed on the foundation of advertent breach conceived as absolutely normatively proscribed conduct. In this approach, the concept of fault is introduced into the evaluation of contractual breach. This leads to an inquiry into the state of mind of the defaulting party and the social effect of breach. Punitive damages may then be considered for the purposes of deterrence and punishment.[30]

(d) FUTURE DEVELOPMENTS

As the debate concerning the nature of contractual obligations develops, a number of approaches to punitive damages for breach of contract becomes possible, as a matter of principle. Several of such approaches are discussed below.

(i) Punitive Damages for Conduct Calculated to Make a Profit

One possible avenue of development is that punitive damages might be permitted for advertent breach of contract calculated to make a profit. This would be directly at odds with the utilitarian conception of contractual obligations, and especially with the view that breaches for profit should be encouraged in the interest of economic efficiency. However, if it is accepted that deliberate breaches of contract are generally inefficient, or that they constitute absolutely normatively proscribed conduct, then the case for punitive damages for breach of contract becomes the same as in the tort for profit situation.[31]

(ii) Punitive Damages for Exceptional Conduct

A second possible avenue of development is that punitive damages might be permitted for advertent breach of contract where the defaulting party's conduct is exceptional.[32] This would appear to be the rule endorsed by the minority in *Vorvis*, although the minority decision might be explained on other grounds.[33]

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[30] See Trakman, *supra*, note 24, at 4.

[31] See *supra*, ch. 6, note 20 and accompanying text.

[32] There are three Canadian cases that seem to adopt such an approach. One appears to be wrongly decided. See *Rowland's Transport Ltd. v. Nasby Sales & Services Ltd.*, *supra*, note 8, which appears to have awarded punitive damages for inadvertent negligence. The other 2 might be justified as breach of "community standards" cases. See Venour, *supra*, note 19, at 102. One may have involved concurrent tortious conduct. See *Centennial Centre of Science and Technology v. VS Services Ltd.*, *supra*, note 9. In the other, the plaintiff could well complain that the standard for punishment could not have been foreseen in advance. See *Edwards v. Lawson Paper Converters Ltd.* (1984), 5 C.C.E.L. 99 (Ont. H.C.J). The uncertainty in the exceptional conduct standard is a legitimate problem. The decision in *Vorvis v. Insurance Corporation of British Columbia*, *supra*, note 2, may preclude further judicial development along these lines.

The exceptional conduct approach is not entirely inconsistent with the general utilitarian view of contractual obligations. Freedom to breach does not entail necessarily freedom to breach maliciously, and it is difficult to support gratuitous malice on efficiency grounds. Under the moral view of contractual obligations, this approach is sound in theory.

The majority in *Vorvis* held that the breaching party could be held liable for punitive damages if the conduct was independently tortious. Hence, the question is whether punitive damages might be allowed also for advertent exceptional breach that is not independently tortious. While the utilitarian view and the moral view of contractual obligations would lead to different conclusions on this issue, a compromise solution might be possible. One approach might be to identify those types of exceptional breach of contract that are unique to the contractual context – and hence would not be independently tortious – but that are similar in theory to cases in which punitive damages might be awarded in tort. Such a theoretical nexus might be found in the notion of abuse of power Thus, cases of breach of contract in which there has been an abuse of contractual power might be identified as being sufficiently similar in theory to certain tort cases as to justify an award of punitive damages. Underlying the rules governing the imposition of punitive damages in tort is a relatively consistent notion that abuse of power ought to be punished. Power imbalances in contractual settings provide unique opportunities for abuse of power that are not always captured by the general law of tort.[34]

Thus, the concept of exceptional breach might be refined by linking it to the notion of abuse of contractual power. This might be accomplished, for example, by the courts considering the issue of abuse of contractual power on a case-by-case basis, or by developing categories of contractual relationships of utmost good faith or special relationship within which punitive damages might be allowed. For a time, the California courts moved in this direction, but have since retreated somewhat.[35]

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[33] See *infra*, sec. 3(d)(iii).

[34] For example, much of the objectionable conduct in *Robitaille v. Vancouver Hockey Club Ltd.* (1981), 30 B.C.L.R., 286, 124 D.L.R. (3d) 228 (C.A.) was motivated by a desire to escape the defendant's contractual obligations upon termination, and it caused substantial injury to pride and dignity. Some, perhaps most, of the award pertained to this, which was really only dependent on the negligent medical treatment. This case was approved by the Supreme Court in *Vorvis v. Insurance Corporation of British Columbia*, *supra*, note 2. It seems illogical that the plaintiff in *Vorvis* should fare differently because there was no tort duty that would legitimize a dependent claim. This supports the case for the development of an independent wrong to take into account unique wrongs in contractual settings. See *infra*, note 52 and accompanying text.

[35] For a rejection of the general case for punitive damages for bad faith dealing in commercial contracts, and a review of the relevant cases, see *Oki America Inc. v. Michrotech International Inc.*, 872 F.2d. 312 (9th Cir. C.A. 1989), *per* Kozinski Cir. J.

(iii) Punitive Damages for Failure to Honour Known Obligations to Pay Money

There is at least one type of case of breach of contract where the arguments in favour of punitive damages are compelling. This is the case where the defendant breaches the contract deliberately, and refuses or fails to tender compensation known to be owing to the plaintiff. This could be a case where, without justification, the defendant fails to perform and does not tender damages for the breach, or a case where the defendant declines to honour a known contractual obligation to pay money. Of course, the court would have to distinguish between a true case of denying contractual obligations known to exist, and a *bona fide* dispute over the existence or extent of liability.[36]

Punitive damages in such a case are clearly consistent with the moral view of contractual obligations. They are also consistent with the utilitarian view. Under this view, the right to breach is conditional upon the payment of damages. Typically, the failure to pay compensation known to be owing has been regarded as a "peripheral concern of enforcement".[37] Given the nexus in the utilitarian view between the right to breach and the obligation to compensate, it might be better described as absolutely normatively proscribed conduct, as is advertent tortious conduct.

The case for punitive damages in these circumstances is much the same as it is in the tort for profit situation, and may be justified on both retributive and deterrence grounds.[38] The fact that the defendant refuses to honour a known obligation to pay money suggests that there exists some imbalance of power in the relationship that makes it worthwhile for the defendant to do so.[39]

Punitive damages for failure to honour a known obligation to pay money might play a useful role in wrongful dismissal cases.[40] An award of punitive damages on this basis appears to be consistent with the minority holding in *Vorvis*. The reprehensible conduct that the minority adopted as the criterion for liability seems to reduce to a combination of this and a concern with intentional infliction of aggravated damages. On the other hand, there is much to be said for the majority's holding that the conduct was not sufficiently exceptional to justify punitive damages, if exceptional conduct means something beyond the mere failure to honour a known legal obligation.

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[36] See *Jennett v. Federal Insurance Co.*, *supra*, note 9, and Venour, *supra*, note 19.

[37] Trakman, *supra*, note 24, at 9.

[38] See *supra*, ch. 6, note 20 and accompanying text.

[39] In the typical wrongful dismissal or insurance contract case, the abuse of contractual power is manifest. These are the types of case that have resulted in punitive awards in Canada to date. This case for punitive damages does not depend on the defendant's conduct having been exceptional in any manner independent of the refusal to pay.

[40] The California Supreme Court has recently held that punitive damages are no longer available for breach of a contract of employment, as they once were in that jurisdiction. See *Foley v. Interactive Data Corp.*, 254 Cal. Rptr. 211 (S.C. 1988). However, in the same case the court confirmed and justified the application of the rule giving rise to punitive damages in insurance cases. The bases for the distinction between employment and insurance cases, and the court's rejection of punitive damages in employment cases, are not compelling. The real basis of concern exhibited in the California courts might be the law of punitive damages that makes grossly excessive awards possible. This is clear in *Oki America*, *supra*, note 35. As explained elsewhere in this report, this is not a concern in Ontario.

This approach also seems to address the concerns that support punitive damages in the so-called bad faith insurer cases. One variation occurs where insurance companies fail to honour clear first party obligations.[41] This latter type of case might escape the confines imposed in *Vorvis*. The statutory obligation to pay first party benefits has been relied upon to distinguish this from the purely contractual claim.[42] This reasoning may not avail, however, where the insurer fails to settle a claim within policy limits and exposes the insured to personal liability.[43] Otherwise, there is no reason to distinguish the two types of claim. The efficient breach rationale is inapplicable to an unjustifiable refusal to honour a contractual obligation to pay money. Insurance contracts are said to be governed by duties of utmost good faith.[44] This supports the substantive case for punitive damages. It also provides an avenue for the development of a duty in tort, if *Vorvis* makes this necessary.[45] This type of case is one where the argument for a deterrence gross up is also compelling.

This raises the possibility of a more restrictive approach to punitive damages for the failure to honour a known obligation to pay money. Punitive damages might be limited to wrongful dismissal and insurance cases, the types of cases that have given rise to punitive damages in Canada to date.

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[41] In *Thompson v. Zurich Insurance Co.* (1984), 45 O.R. (2d) 744, 7 D.L.R. (4th) 664 (H.C.J.) damages for mental distress were awarded, but punitive damages were denied on the facts. The possibility of punitive damages in such a case was left open in *Jennett v. Federal Insurance Co., supra*, note 9, and *Maschke Estate v. Gleeson* (1986), 54 O.R. (2d) 753, 18 C.C.L.T. 129 (Div. Ct.). See, generally, Cherniak and Morse, "Aggravated, Punitive and Exemplary Damages in Canada", in *Special Lectures of the Law Society Of Upper Canada 1983*[:] *Torts in the 80s* (1983) 151, at 184-93; Venour, *supra*, note 19, at 100-02; and Lerner, "Bad Faith and Punitive Damages" (1986), 54 Assurances 225.

[42] *Jennett v. Federal Insurance Co., supra*, note 9.

[43] There has been one such case in Canada, and it did not discuss punitive damages. See *Pelky v. Hudson Bay Insurance Co.* (1981), 35 O.R. (2d) 97, [1982] I.L.R. 1-1493 (H.C.J.). There are numerous such cases in the United States. See Cherniak and Morse, *supra*, note 41.

[44] *Thompson v. Zurich Insurance Co., supra*, note 41, and *Maschke Estate v. Gleeson, supra*, note 41.

[45] In the United States such a tort duty was the original basis on which punitive damages were awarded against insurers. See Cherniak and Morse, *supra*, note 41. At present, however, some cases base the award on oppressive breach of the contract itself. See Venour, *supra*, note 19, at 100. Interestingly, there seems to be little criticism of this development in the insurance context in the United States.

Such cases typically involve the abuse of contractual power, which might not be the case in all other circumstances captured by a more general rule.[46]

4. AGGRAVATED DAMAGES (COMPENSATION FOR INJURY TO PRIDE AND DIGNITY)

Earlier in this report,[47] the Commission recommended that a plaintiff should be entitled to compensatory damages for injuries to pride and dignity as part of the ordinary global award of damages for non-pecuniary loss. We stressed that the question of compensation should be isolated from the question of punishment, and that the term aggravated damages ought to be abandoned to reflect this. In this section we consider the possibility of a similar rule in actions for breach of contract. Because the issue is compensation, not punishment, the analysis differs from the analysis of punitive damages in contract.

First, the utilitarian objections to punitive damages in contract are not compelling in the case of aggravated damages. There is no reason to suggest that the right to breach a contract should entail the right to cause unnecessary injury to pride and dignity in the process. Moreover, it is inefficient to encourage aggravated damages.

In tort, aggravated damages are not imposed for the tort *per se*; rather they are imposed for the motive for or mode of committing the tort.[48] The award of aggravated damages is dependent upon the commission of a tort. Under the utilitarian view, advertent breach of contract is not wrongful. Unlike the case in tort, aggravated damages in contract would be dependent upon a morally neutral act. In effect, the utilitarian objection to aggravated damages would seem to rest on the rather technical point that such an award would not be dependent upon another wrong, the defaulter being entitled to breach. This seems to be reflected in the majority judgment in *Vorvis*, which held that the defendant's conduct must be independently actionable to support an award of aggravated damages.[49]

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[46] This is particularly so in wrongful dismissal, because the decision in *Vorvis* to preclude damages for mental distress gives the employer extra bargaining power. In other cases, the imbalance of power may arise solely because the defaulting party can force the other to litigate before honouring its known obligation to pay money.

[47] See *supra*, ch. 5.

[48] In tort, extra damages take into account the conduct of the defendant right up to and including the trial. See *Rookes v. Barnard, supra*, note 5, at 1228. Compare *Sheehy v. Wolf* (1984), 6 C.C.E.L. 101 (Ont. Co. Ct.) discussed in Venour, *supra*, note 19, at 99. Most torts are committed by isolated acts where the wrong and the aggravated damage occur and end simultaneously. In contract, there may be more of a temporal gap between the infliction of the aggravated damage and the moment of breach. See, also, *supra*, note 34.

[49] The minority rejects this restriction explicitly. However, it accepts it implicitly by limiting damages to the mental distress that could have been contemplated as flowing from unjust dismissal. If the focus had been the damages that would have been contemplated as flowing from the *particular mode* of dismissal, damages for mental distress might have been allowed

It is questionable whether this is a sufficient objection to the imposition of aggravated damages for breach of contract. It might be artificial to attempt to distinguish between damage caused by the breach, and damage caused by the mode and motive for the breach. For example, while the conduct in *Vorvis* that was alleged to have aggravated the loss did precede the moment of technical breach in time, it was intimately related to the employer's attempt to circumvent its legal responsibility when terminating the employment.[50]

Under the moral model of contractual obligations, an argument might be made for aggravated damages dependent upon the deliberate breach of contract. Advertent tort and advertent breach of contract are both absolutely normatively proscribed conduct. The moral view thus supports the same rule for recovery for aggravated damages in both tort and contract. Justification might include an honest, or perhaps a reasonable,[51] but mistaken belief on the issues of liability or quantum of compensation.

It appears that the courts might intervene, indirectly, in response to the decision in *Vorvis*. The cases reveal sympathy for aggravated and punitive damages in similar circumstances. *Vorvis* precludes a direct response for the present, but it approves of extra damages for independently actionable wrongs. The law of tort has proved flexible at developing new causes of action. There exists a general trend to superimpose concurrent and more extensive duties in tort on relationships previously governed by contract. The repercussions of such a development might be significant and extend well beyond the scope of the present inquiry.

The courts might consider further limiting conditions for aggravated damages as were discussed above, in the context of punitive damages. Thus, for example, injuries to pride and dignity might be compensated if there was a deliberate breach accompanied by exceptional conduct,[52] or abuse of contractual power. Recovery might be restricted to actions involving the failure to honour a known obligation to pay money. Aggravated damages might be allowed only in actions for wrongful dismissal and actions against

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by the minority in *Vorvis*. The minority rejects aggravated damages under the head of mental suffering, but seems to allow them under the head of punitive damages. When the minority supports punitive damages, it emphasizes the defendant's conduct, but it also speaks of the plaintiff having been harassed and humiliated. There is at least some element of tortious aggravated damages in the punitive damages that the minority would have awarded.

[50] See *Vorvis v. Insurance Corporation of British Columbia*, *supra*, note 2, at 224-25. Indeed, the failure to compensate for aggravated damages encourages parties to attempt to avoid known legal obligations without further risk.

[51] With issues of compensation, not punishment, reasonable conduct might be most appropriate.

[52] In *Vorvis v. Insurance Corporation of British Columbia*, *supra*, note 2, the minority appears to endorse the exceptional conduct approach, but what made the conduct exceptional seems to have been the employer's attempt to circumvent its obligation to pay money in lieu of notice.

bad faith insurers. Many of the same difficulties arise as were considered with punitive damages, although the objections to compensatory recovery are less compelling than the objections to civil punishment.

Contracts of employment are the most obvious example of a relationship where one party has the power, by virtue of the relationship, to injure the pride and dignity of the other. As indicated in the minority judgment in *Vorvis*, the power relationship in the employment contract is what makes the abuse possible and particularly needing of sanction.[53] The Supreme Court of Canada's failure to recognize the non-pecuniary aspect of the employee's contract gives the employer additional power that may be abused. Bad faith claims against insurers who fail to honour first party obligations may occasionally cause aggravated damages that stem from the power imbalance in the relationship.[54] Wrongful dismissal and bad faith insurer cases would likely be the most common instances of aggravated damages claims, but the underlying basis of liability might occasionally apply to other contractual relationships.

5. CONCLUSIONS

As we discussed above, there is an ongoing debate – in the literature and, implicitly, in the courts – about the nature of contractual obligations. The case for punitive and aggravated damages in contract depends, to a large extent, on how this debate is resolved.

The Commission has concluded that it would be premature to make specific recommendations for reform of the law of punitive damages in the case of breach of contract, at least until the debate, and its implications for punitive damages, have developed more fully. For similar reasons, the Commission has determined that it would be prudent to await further developments in the area before making any substantial recommendations for change to the law governing aggravated damages.

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[53] *Ibid.*, at 224. See, also, *Le Procureur Général de la Province de Québec v. Corriveau*, [1989] R.J.Q.1 (C.A.), awarding "dommages moraux" in wrongful dismissal.

[54] If an insurer refuses to honour a claim, whether or not there is bad faith, this might well support a claim for mental distress. Avoiding mental distress is usually part of the reason why one purchases insurance. Bad faith breach might support a claim for punitive damages. However, if in an effort to avoid paying a just claim the insurer were to allege that the insured were a malingerer, for example, a case for aggravated damages might also be made.

SUMMARY OF RECOMMENDATIONS

The Commission makes the following recommendations:

CHAPTER 5 COMPENSATION FOR INJURY TO PRIDE AND DIGNITY: BEYOND AGGRAVATED DAMAGES

1. (1) The court should be empowered to award compensatory damages for injuries to pride and dignity as part of the ordinary global award of damages for nonpecuniary loss.

   (2) Such an award should be available for ordinary tortious conduct, that is, without proof of exceptional conduct.

2. Aggravated damages, as they are currently understood, should be abolished.

CHAPTER 6 THE GENERAL CASE FOR PUNITIVE DAMAGES: EXEMPLARY DAMAGES AS PUNISHMENT

3. (1) Exemplary damages for the purpose of punishment should continue to be available in Ontario, and should be referred to as "punitive damages"

   (2) The determination of the question whether to award punitive damages, and the quantum of such damages, should be constrained by retributivist principles.

4. (1) Punitive damages should be awarded only where the defendant has advertently committed a wrongful act deserving of punishment, and where the defendant's conduct was exceptional.

   (2) Advertent wrongful conduct should comprehend the case where the defendant knew or ought to have known that the act was wrong.

   (3) Exceptional conduct should include not only conduct that is described under the present law as being, among other things, malicious, highhanded, outrageous, or cynical, it should also include conduct engaged in for the purpose of making a profit.

(4) The regime for punitive damages proposed in this report should apply equally to corporations and individuals.

5. (1) The fact that there have been or might be criminal or other similar proceedings against the defendant should not operate as a bar to an award of punitive damages.

(2) In determining the extent, if any, to which punitive damages should be awarded, the court should be entitled to consider the fact and adequacy of any prior penalty imposed in any criminal or other similar proceeding brought against the defendant.

(3) The fact that the defendant has not been charged or prosecuted and the limitation period for criminal or other proceedings has expired should not operate as a bar to a claim for punitive damages.

6. (1) The size of an award of punitive damages should be proportionate to the gravity of the act deserving of punishment.

(2) The present requirement that the punishment be quantified with reference only to the tort committed against the plaintiff should be retained. The award should be made to punish the defendant for the act that caused the plaintiff's injury, and it should be proportionate to that wrong alone.

7. (1) In a trial by judge and jury, the power to quantify an award of punitive damages should remain with the jury.

(2) In the trial of an action for punitive damages, the judge should be empowered to give guidance to the jury concerning the quantum of such damages.

(3) Counsel should have the right to make submissions to the judge or the jury, as the case may be, on the quantum of punitive damages, subject to the trial judge's overriding discretion to control proceedings of the court.

(4) An appellate court should have the power, when setting aside a jury or court assessment of punitive damages, to substitute its own assessment, instead of ordering a new trial, if it thinks this to be just in the circumstances.

8. The present discretion of the courts to control inquiry into the defendant's wealth should continue.

9. Punitive damages should be quantified without regard to the assessment of compensatory damages.

10. The rule requiring the plaintiff to satisfy the ordinary civil burden of proof should be retained.

11. (1) The courts should be directed to develop a rule of vicarious liability that is narrower than the ordinary *respondeat superior* rule used for compensatory damages, such that an employer would be vicariously liable for punitive damages only in the case of complicity, that is, where the employer tacitly approved of the employee's conduct.

    (2) The court should be required to choose between vicarious liability, either for the full amount of punitive damages or for a portion of that amount, or no employer liability for punitive damages.

12. In the case of concurrent wrongdoers, a separate judgment for punitive damages should be entered against each concurrent wrongdoer held liable for such damages.

13. (1) In the event of the death of the plaintiff, a claim for punitive damages should survive for the benefit of the estate.

    (2) In the event of the death of the tortfeasor, a claim for punitive damages should not be permitted against the estate.

CHAPTER 7 TORT RESULTING IN PROFIT: PUNITIVE DAMAGES AND RESTITUTION

14. Where a plaintiff waives a tort committed by the defendant, and pursues a restitutionary remedy, she should also be entitled to claim punitive damages in an appropriate case, that is, where such damages would otherwise be available under the recommendations made in this report.

CHAPTER 8 NEGLIGENCE, NUISANCE, AND EQUITABLE WRONGS

15. The above recommendations respecting damages for injuries to pride and dignity should apply to actions in negligence (see recommendations 1-2).

16. (1) Punitive damages should be available, in accordance with our earlier proposals, in an action for negligence (see recommendations 3-13).

    (2) The plaintiff should be required to prove that she was a victim of such conduct, although she should not be required to prove that she was a specifically targeted victim.

17. Punitive damages should be available, in accordance with our earlier proposals, in cases of nuisance (see recommendations 3-13).

18. Punitive damages should be available, in accordance with our earlier proposals, in cases of equitable wrongs (see recommendations 3-13).

CHAPTER 9 PUBLIC AUTHORITIES

19. The above recommendations respecting damages for injuries to pride and dignity should apply to actions against public authorities (see recommendations 1-2).

20. (1) Public authorities should remain independently liable for punitive damages, in accordance with our recommendations made in respect of punitive damages generally (see recommendations 3-10 and 12-13), where they advertently exceed their legal authority and injure another tortiously.

    (2) Exceptional conduct on the part of the defendant should not be required.

21. The above recommendation regarding vicarious liability, made in connection with punitive damages generally (see recommendation 11), should apply to public authorities.